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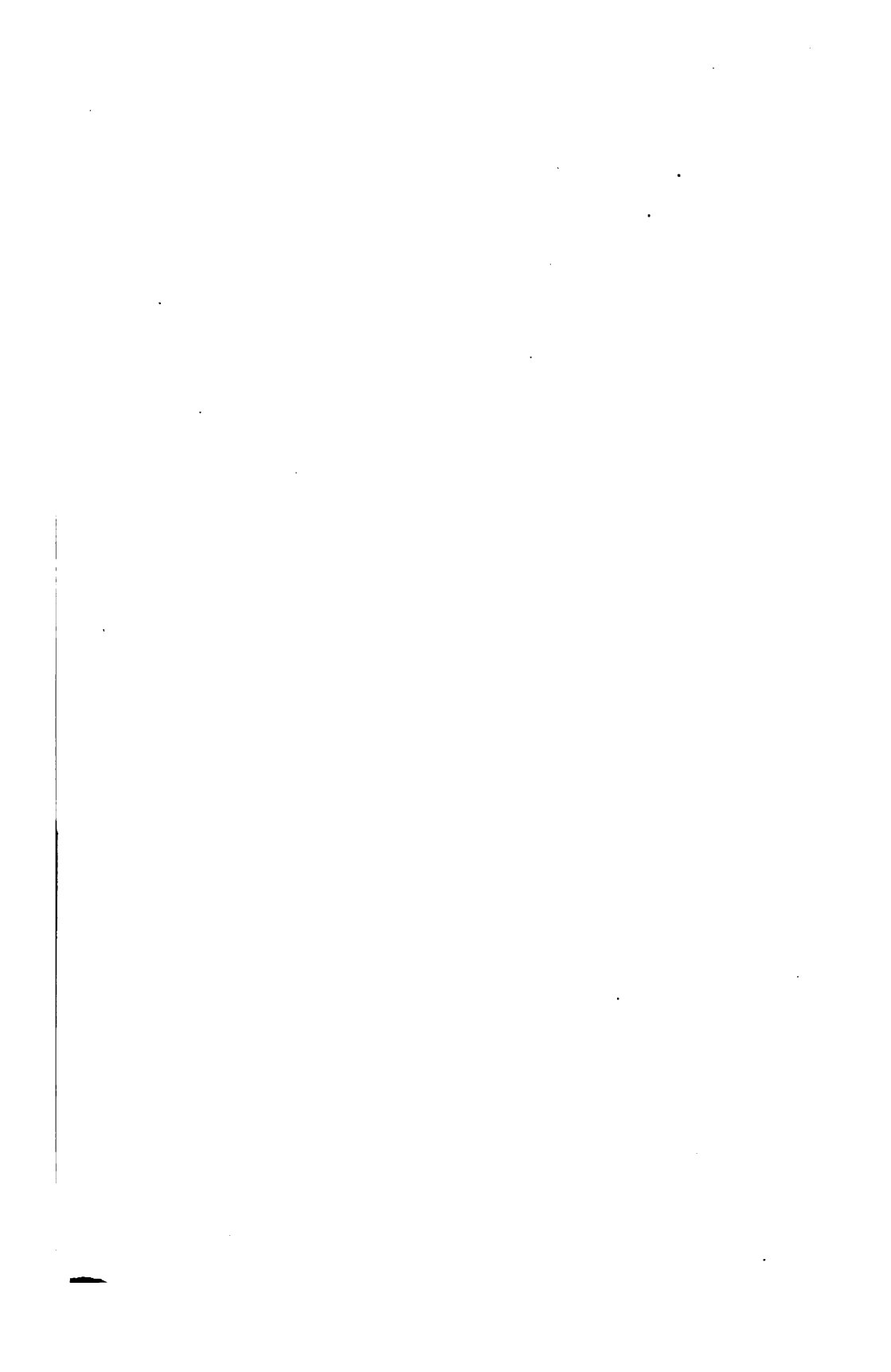
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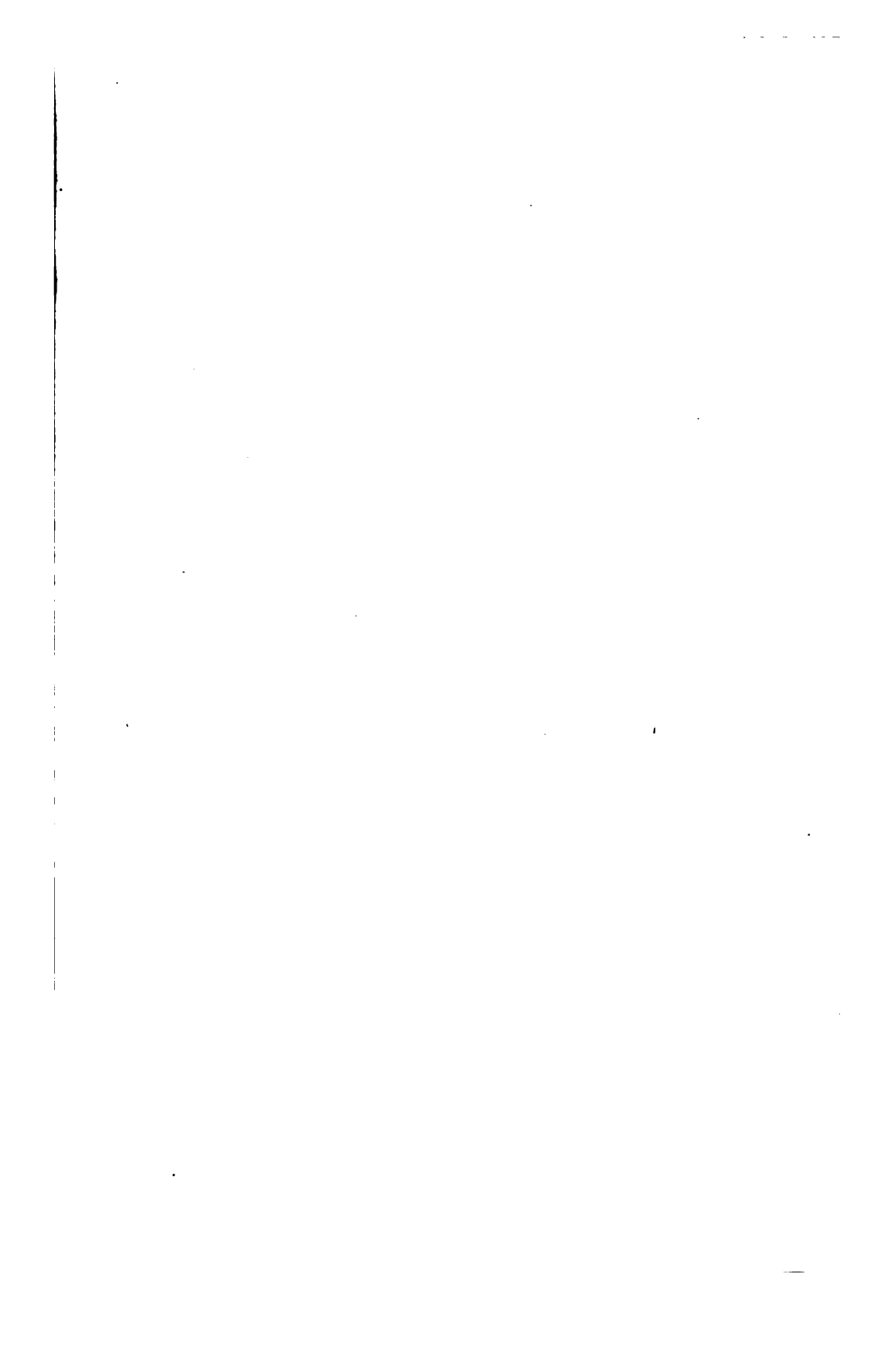


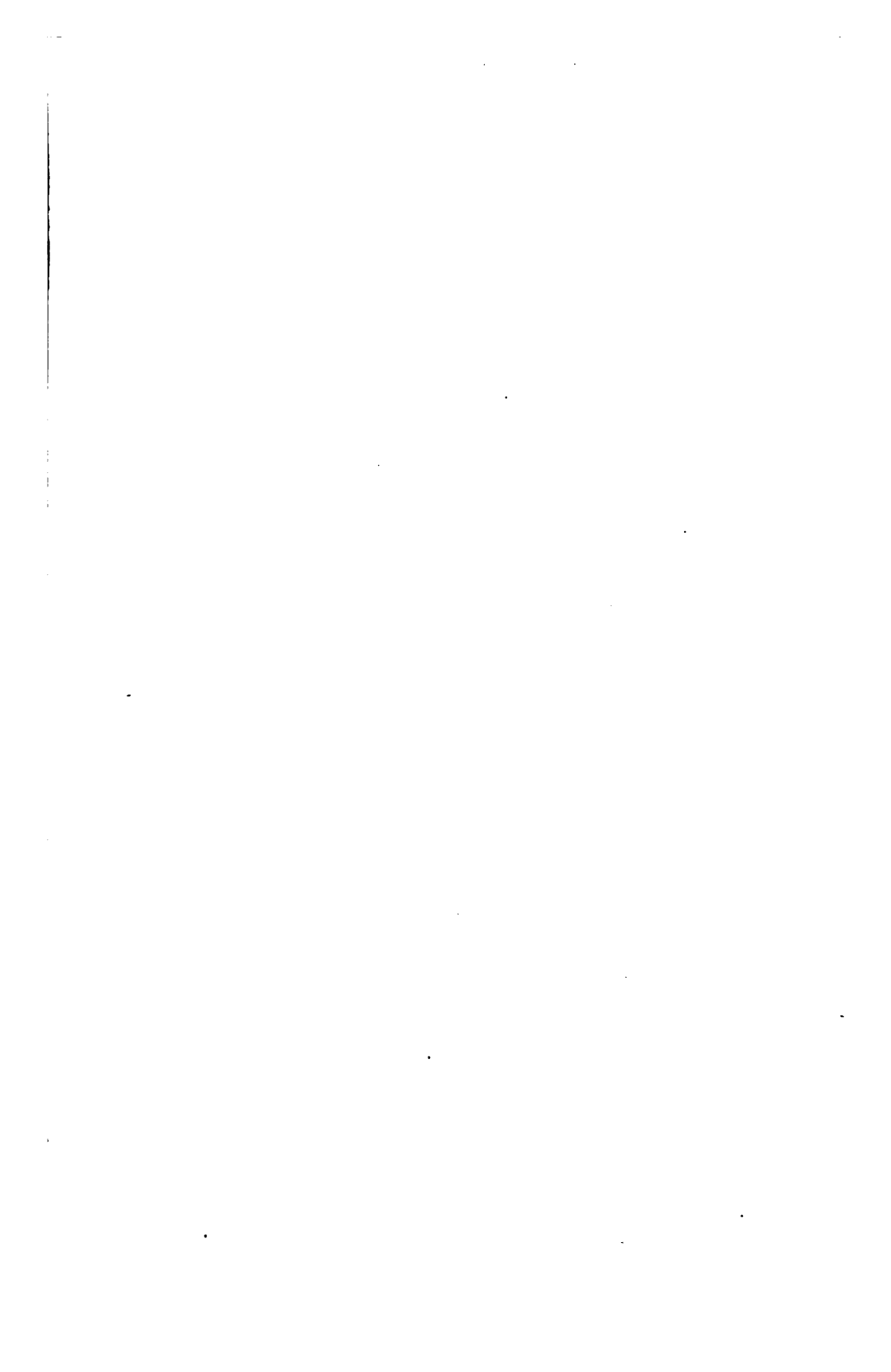
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ERRATA

Page 24, 1st syllabus, line 1, for 155 read 115

Page 24, 2d syllabus, line 1, for 192 read 92

Page 36, 2d syllabus, line 2, for owner read one

Page 98, 1st syllabus, line 2, for formerly read formally

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 15002. Department One. January 6, 1919.]

EDWARD BURKE, *Respondent*, v. E. E. MAYER *et al.*,
Appellants.¹

EVIDENCE (167) — PAROL AFFECTING WRITINGS — FRAUD. In an action for fraudulent representations inducing a trade by plaintiff, who could neither read nor write, evidence relating to the conditions under which the instruments were executed is not inadmissible as varying the terms of the written contracts.

FRAUD (7, 8, 22) — RELIANCE ON REPRESENTATIONS AND RELATIONS — EVIDENCE — SUFFICIENCY. Where plaintiff, an old man who was deaf and could neither read nor write, was induced by his confidential agent to make a trade for land belonging to the agent, who concealed his interest in the transaction, plaintiff may rely on representations as to the condition of the lands received in the trade and that they were under irrigation from ditches pointed out, notwithstanding that he visited the land and might have ascertained its true condition and value.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered February 27, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for fraud. Affirmed.

D. R. Glasgow and *A. O. Colburn*, for appellants.

Ayers, McDonald & Greenough and *Del Cary Smith*, for respondent.

¹Reported in 177 Pac. 662.

TOLMAN, J.—This is an action for fraud and deceit, tried to a jury, resulting in a verdict and judgment in favor of respondent, who was plaintiff below. There was much conflict in the testimony, the record is long, and, so far as necessary for an understanding of the case, a sufficient statement is that there was evidence from which the jury found, or might have found, the following facts: That respondent, at the time of the trial below, was about eighty years old, uneducated, not able to read or write, save to sign his own name, and so deaf that he could not hear or understand an ordinary conversation; that, for some years, he had owned a half section of wheat land in Lincoln county, Washington, alleged in his complaint to be worth not less than \$8,000, and conceded by the answer to be worth \$6,400, on which there was a mortgage for \$1,725. Appellant E. E. Mayer, hereinafter referred to as appellant, who owned land adjoining respondent's farm in Lincoln county, had for some years leased respondent's land and looked after all of his business affairs for him with reference to the land, such as paying interest on the mortgage, paying taxes, etc., and making settlement for the proceeds of respondent's share of the crop after deducting such payments. Respondent, being a resident of Minnesota, came to Washington but infrequently, and the correspondence tends to show that he relied absolutely upon appellant with respect to all business matters touching his farm, and that the relations between the parties became confidential.

In the latter part of the year 1912, appellant advised respondent that he did not care to rent his land any longer, that he had disposed of his own land, having traded a half section of it for a ten-acre tract of land near Vera, in the Spokane valley, and suggested that

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he could procure a like trade for respondent. Appellant took the respondent to the Vera tract, showed him the land, the irrigation ditches running beside it, represented that the ditches were appurtenant to the land, and that the land had a water right and was under irrigation from these ditches. He also showed to respondent what he claimed to be the ten-acre tract adjacent for which he had traded his own wheat land. Appellant represented that the ten-acre tract was worth as much as or more than respondent's wheat land, that it would bring him more income than his wheat land, and suggested that he might be able to make a trade for respondent by which the latter would exchange his wheat land for the ten-acre tract shown him, subject to a first and a second mortgage aggregating \$1,500, and receive \$1,500 in cash as boot money; and to further induce respondent to make the trade, agreed to lease the ten-acre tract from respondent when he should acquire title, and pay him \$500 per year rent for a period of four years. The trade was consummated on March 8, 1913. But it now appears that appellant himself owned the ten-acre tract at Vera which in the trade was conveyed to respondent, and he himself took title to the wheat ranch which formerly belonged to respondent, so that, by having obtained a deed in blank from his grantor and inserting respondent's name therein as grantee, and by obtaining a deed to the wheat land from respondent in blank, in which he afterwards inserted his own name, he appears to have been able to conceal from respondent the true facts as to his personal interest in the transaction. And respondent claims that he was all the time relying upon appellant's friendship for him and supposed unselfish interest in his affairs to protect him in the transaction. There is evidence that

respondent took a disinterested friend to see the tract at Vera shortly after the deal was made, and that this friend learned that the Vera land had no water right and was unirrigated, or what is known as dry land. That respondent then learned this fact, or any fact tending to put him on inquiry, as to the falsity of the representations as to the land being irrigated, or at all, until shortly before the bringing of the action, he squarely denies.

After closing the trade, a written agreement was entered into between appellants and respondent by which respondent turned over to appellants the possession of the Vera tract for a period of four years, the consideration being that appellant should pay off the \$1,500 secured by mortgages on the tract, the interest thereon, and all taxes assessed against the property during the life of the contract, and in which an option was given to appellants to purchase the tract by paying to respondent the sum of \$5,500 in excess of the encumbrances upon the property. And in pursuance of this contract, respondent gave to appellant a deed of the Vera tract. Much evidence is introduced as to whether or not the boot money was fully paid, and how it was paid, if at all; but appellant claims to have paid all the boot money, and also to have paid \$500, representing the first year's rental of the Vera tract.

Respondent returned to Minnesota, and again came to Spokane near the close of the year 1913, and seems to have thought there was more money coming to him from appellant; or not to have been satisfied with the time and manner of payment, and to have desired more money from appellant. There were negotiations at that time resulting in the signing of a written instrument, dated January 3, 1914, purporting to cancel

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and discharge the lease and option agreement entered into on April 12, 1913, and appellant returned to respondent the deed which he had given him conveying the Vera tract, which had never been recorded; and to secure an advance of \$270, respondent executed a mortgage for that amount, which became a third mortgage upon the Vera tract. This mortgage, together with the second mortgage for \$500, which he purchased and had assigned to him, appellant afterwards foreclosed, thus obtaining title to the Vera tract. Respondent again returned to his home in Minnesota, but upon coming to Washington in 1916, claims to have discovered for the first time that the Vera tract had no water right, was not irrigated, and was of comparatively little value, and that the representations as to the rental value were false and made for the purpose of inducing the transfer. And also, at about the same time, to have discovered that the trade was made by appellant in his own interest, instead of acting as the agent of respondent in procuring a trade with a third person as respondent had believed.

Appellants made twenty separate assignments of error, and it is manifestly impossible to set forth and discuss each one within reasonable limits. We shall, therefore, confine ourselves to the comment necessary to dispose of the particular assignments which are argued, and upon which reliance is chiefly placed.

I. It is claimed that the trial court erred in permitting the introduction of evidence to vary the terms of the written instruments hereinbefore referred to as the lease and option and the later cancellation agreement. Respondent, who testified that he could neither read nor write, claims that, if the instruments were read to him, he did not know or understand their contents, and that they were represented to him to be

something other than what they were. In an action sounding in fraud, such as this, it is for the jury to say from the instruments, and from all of the evidence relating to the conditions under which they were executed, whether respondent executed them with knowledge of their contents, and, also, whether the instruments, though legally executed and fair on their face, were part of a general scheme to defraud.

II. It is contended that the court should have sustained appellants' motion for a directed verdict and for judgment *non obstante veredicto*, because respondent had access to the Vera land before making the trade, and knew, or could have learned by reasonable inquiry, its true condition and value, or at least should have learned all such facts shortly after the trade was consummated; and further erred in refusing certain instructions proposed by appellants upon this theory. It may be conceded that, if respondent had been a thoroughly equipped business man in the possession of all of his faculties, and dealing with a stranger at arm's length, the argument presented would have considerable force. But when the age, lack of education, and deafness of respondent are considered, and more especially when the evidence as to the confidential relation upon which respondent relied is borne in mind, we are convinced that the trial court properly submitted to the jury all of these questions. We have carefully read the abstract and supplemental abstract of the record, and have read the record itself upon the points suggested by appellants, and are convinced that the case was as fairly tried as it well could be under the circumstances which then existed; that the jury was properly instructed upon the law; that none of appellants' assignments of error are well founded; that the real issues were of fact only, and that there

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Statement of Case.

exists no ground upon which we can interfere with the verdict.

Judgment affirmed.

MAIN, C. J., MACKINTOSH, MITCHELL, and CHADWICK, JJ., concur.

[No. 15005. Department One. January 6, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
GIULIO ARGENTIERI, *Appellant*.¹

WITNESSES (78) — CROSS-EXAMINATION — SCOPE — LIMITATION TO DIRECT. In a prosecution for rape of a girl under age, a witness testifying as to a conversation he had with the defendant about the girl, may not be cross-examined relative to conduct between the defendant and girl for the two years prior to the offense.

SAME (63) — EXAMINATION BY COURT. Error cannot be predicated upon questions propounded by the trial court in efforts to assist a witness who had difficulty in understanding English, where no partiality was shown and no prejudice resulted.

SAME (107) — EXAMINATION OF CHARACTER WITNESS. In the examination of a character witness offered by one accused of rape, it is proper for the court to enforce the rule that the witness answer yes or no to the question as to knowledge of reputation, without reference to business reputation, and if the witness answers no, the inquiry is ended; general reputation for good morals, not possible delinquencies, being the proper inquiry.

CRIMINAL LAW (193) — CONTINUANCE — APPLICATION. A continuance of a criminal case to secure the testimony of a nonresident witness is properly refused where it was not shown that it could be obtained in a reasonable time.

CRIMINAL LAW (356) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE — DELAY. It is not error to deny a new trial to secure the evidence of a nonresident witness whose address was known before the trial, where no showing was made that he would testify if a new trial were granted.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 8, 1918, upon a trial and conviction of rape. Affirmed.

¹Reported in 177 Pac. 690.

E. F. Kienstra, for appellant.

Alfred H. Lundin and *John D. Carmody*, for respondent.

MITCHELL, J.—Defendant was convicted of the crime of statutory rape, committed upon the person of a girl thirteen years of age. A motion for a new trial was denied. From a judgment and sentence, defendant appeals.

The state called a witness who, in direct examination, testified only concerning conversations he had with the defendant about the girl. Upon cross-examination he was asked relative to conduct between the defendant and the girl for the last two years prior to the offense charged. An objection to this as improper cross-examination was properly sustained.

Further, in the cross-examination just referred to, the judge asked the witness a question or two, which conduct is claimed to be prejudicial. The witness is an Italian and had difficulty in understanding and speaking English. The necessity for an interpreter had been considered, and the witness had already several times expressed a wish for one, but all other parties were content to proceed without one. The witness spoke in a low tone of voice. Counsel on each side, at times, alternately and informally asked questions in efforts to assist the witness, who evidently was troubled to find the proper English to express what the defendant had said to him in Italian. In this situation, the court asked one or two questions in the same spirit, for the same purpose, and apparently in a proper manner, eliciting from the witness nothing, however, different from what he had already testified to, and immediately the prosecuting attorney, without any objection, had the witness use an Italian word to express his idea. The circumstance exhibits

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no partiality on the part of the trial judge, and while one, if aggrieved at any improper conduct of the court in the examination of a witness before a jury, need not necessarily object or take exception thereto in order to claim error upon it, nevertheless it is noticeable that counsel for defendant, rather faithful in making objections and taking exceptions in the trial of this case, seemed to have found no fault with the court's action at the time, evidently treating it the same as we view it, of small moment and without prejudice.

It is claimed there was error in remarks and rulings of the court in the taking of the evidence of J. A. Cathcart, a character witness for the defendant. After the witness testified that he had had occasion to investigate the defendant's character during the last three years, the following occurred:

"Mr. Fullen (for defendant): Question: Are you acquainted with his reputation as to general moral character? The Court: Answer that yes or no. It is not in a business way we are inquiring now. Answer: I think I would have to say no. Mr. Fullen: Exceptions to the court's remarks. The Court: The jury will disregard the court's remarks. I was talking to counsel and not to the jury. Mr. Fullen: Exceptions to the court interfering with the witness, and with the examination of the witness. Mr. Fullen: Question: Are you acquainted with his general reputation as to moral character in this community? The Court: Answer that yes or no. Answer: Well, Judge, I don't know what he means; if you mean in a business way. The Court: He doesn't mean in a business way. Answer: No. Mr. Fullen: Exceptions to the court's remark. It does mean in a business way. The Court: The record shows that you have challenged the court's remarks; that is sufficient; proceed. Mr. Fullen: The court has eliminated the business proposition. General moral character is made up of everything, including business. Mr. Fullen: Question: Are you acquainted with his general reputation

as to morality, which includes business? The Court: Answer yes or no. Mr. Fullen: Exceptions. Answer: I think I would have to say no in accordance with the court's remarks. If I was acquainted with his private life I would not hesitate, but I am not in this case. I have only known him as I have come in contact with him. As far as my investigation went as to his business standing, as to relations I had with him, he stood very high."

The court, in the case of *State v. Surry*, 23 Wash. 655, 63 Pac. 557, has declared the rule to be:

"It is a general rule in criminal cases that evidence of the character of the accused, when offered by him, is relevant and therefore admissible. But the character or reputation he is entitled to prove must always be such as would make it unlikely that he would commit the particular offense with which he is charged."

To the same effect, *State v. Schuman*, 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A 633; 1 Wharton's Criminal Evidence (10th ed.), p. 181, § 59.

The orderly and proper way to put in evidence of this sort, after the witness has testified to acquaintanceship with the defendant not too remote in point of time, is to have the witness answer no or yes, as the fact is, to the question, if he knows what the general reputation of the defendant is, in the community in which he resides, for the particular trait of character (naming it) that is relevant to and involved in the crime with which the defendant is charged. If the witness answer no, that ends the inquiry. If he answer yes, then the next and final question should be, What is it, good or bad? It is to be noticed the trial court only attempted to enforce respect for these rules. The defendant, however, finally had his way, as is disclosed by the last question and answer. Thereafter the court properly sustained an objection to the materiality of a question by defendant's counsel to

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this witness, as follows: "Did you ever notice any lapse from any of the elements of morality in all your acquaintanceship?" General reputation for good morals, and not possible delinquencies or lack of them, within the knowledge of the witness, was the proper inquiry.

In the cross-examination of the prosecutrix and her mother, defendant's counsel asked each if, about five years prior to the alleged offense, the girl had not been taken to Dr. Chessman, in Seattle, for examination, on the representation that the child had been raped. Each answered in the negative. At the close of the state's case, defendant asked for a continuance, claiming surprise at such denials of the witnesses, and stated that no attempt had been made to get Dr. Chessman, now a resident of Chicago, Illinois, to testify, because he relied on the belief that the state's witnesses would admit the incident referred to. Not being able to say Dr. Chessman could be had in a reasonable time to testify in the case, the court properly denied the application for a continuance.

This same matter of Dr. Chessman's testimony was urged on the motion for a new trial. It appears that this case had been set for trial once before, at a date about one month earlier than the date on which it was tried, and there is a showing that defendant knew of Dr. Chessman and his address in Chicago in sufficient time to have at least made an application for a further continuance before the trial actually commenced, in order to obtain Dr. Chessman as a witness. No such application was made. Besides, at the time of presenting the motion for a new trial, there was no showing or indication that Dr. Chessman could or would be obtained as a witness if a new trial were granted. There was no error in refusing a continu-

ance of the trial, nor in denying the motion for a new trial on this ground. *State v. Beeman*, 51 Wash. 557, 99 Pac. 756.

Objection is made to evidence of a confession by defendant, the claim being that it was not free and voluntary. Counsel's argument in this respect is general only. The record convinces us that the state responded to the burden imposed and established the fact that the confession was free and voluntary.

Finally, it is argued the court erred in denying the motion for a new trial. Our attention has been called to nothing in support of this assignment other than what has already been noticed. The proof was ample to satisfy the jury of the guilt of the defendant, and the judgment is affirmed.

MAIN, C. J., CHADWICK, TOLMAN, and MACKINTOSH, JJ., concur.

[No. 15010. Department One. January 6, 1919.]

THE STATE OF WASHINGTON, *on the Relation of*
Alfred H. Lundin, Prosecuting Attorney of
King County, Appellant, v. MERCHANTS
*PROTECTIVE CORPORATION, Respondent.*¹

CORPORATIONS (141)—POWERS—LEGALITY OF BUSINESS—PRACTICE OF LAW. A "Merchants Protective Corporation" ostensibly organized to "collect accounts" due its members, but whose sole operation is to solicit legal business for attorneys through the issuance of membership cards which directly challenge its articles and engage, in consideration of a fee, to attend to certain legal business of its members free of charge, is engaged in the practice of law, which is not open to a commercial corporation, and has no right to do business in this state or legal excuse for existence.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 25, 1918, dis-

¹Reported in 177 Pac. 694.

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missing proceedings in *quo warranto*, upon sustaining a challenge to the sufficiency of the evidence. Reversed.

Alfred H. Lundin, for appellant.

R. L. Blewett, for respondent.

CHADWICK, J.—This is a proceeding in *quo warranto*, brought by the prosecuting attorney of King county to inquire as to the right of the respondent to do business in the state of Washington. The respondent is a corporation organized under the laws of the state of Indiana, and has complied with the laws of this state by the filing of proper certificates. The avowed object of the corporation, as stated in its articles of incorporation, is “the collection of accounts and bills receivable due its members and subscribers.” Its method of operation is to engage an attorney at law, or a firm of attorneys, and to then send solicitors about the business community to solicit memberships. The membership fee is \$10. When the solicitation for membership has been concluded, the respondent takes \$9 of the membership fee and gives \$1 to its attorneys. The considerations for the membership fee are recited in the certificate of membership which is handed to each member. They are as follows:

“The Merchants Protective Corporation

“(Incorporated 1913)

“Membership Certificate

“This is to certify that.....is admitted to membership in the above corporation, and is entitled to legal advice and consultation on all business, personal or private matters, without charge at the office of the attorneys retained by and at the expense of the above corporation, for the period of one year from the date hereof.

"Members are defended in all civil or criminal actions brought against them, at any time, in police or justice of the peace courts of this city, without charge, by our attorneys.

"Members receive legal advice and information on all new state laws or ordinances of this city, without charge. The object of this corporation is to protect the above member from loss through fraud, bad credits, bad checks, unfair claims, and to arbitrate all matters when dissension arises.

"Warning

"All persons committing crimes against the above member will be prosecuted to the full extent of the law.

"In witness whereof, the corporation has caused this certificate to be signed by its duly authorized officer and sealed with the seal of the company this day of July,

"(Corporate Seal) S. Reiker, President.

"Gill, Hoyt & Frye

"Attorneys-at-Law

"426-27-28-29 Colman Building

"Seattle, Wash."

When the membership fee is collected and divided between the respondent and the attorneys, the work of the respondent is done. As said in the case of *In re Gill*, 104 Wash. 160, 176 Pac. 11:

"It plainly appears that the Merchants Protective Corporation has no business in Seattle or elsewhere other than the solicitation of members and the collecting of the membership fees, the larger part of which fees are retained by the corporation, the balance being turned over to attorneys with whom it may have entered into contracts of this nature, in a number of different cities and towns throughout the country."

Respondent maintains no offices, but, on the contrary, as was said by one of its officers, the attorneys from thenceforward become, and are, to all intents and purposes, the corporation.

The relator contends that, by its manner of doing business, respondent is practicing law, and that the statutes of this state afford no warrant for such practice by a corporation. The methods of the respondent are so elusive that it is extremely difficult to treat the case from any certain premise. Technically speaking, whatever the avowed purpose of the respondent may be, and whatever its holding out to its subscribers may imply, it can hardly be said that it is engaged in the practice of the law; for, as we have indicated, its only function seems to be to collect a membership fee and leave the shell of its existence in the hands of some lawyer or firm of lawyers who are willing to receive business through such methods of solicitation. On the other hand, and if its object as declared in its articles be rejected and the promises of the respondent as contained in its certificate of membership are retained, there can be but slight question that it is unlawfully engaged in the practice of the law. For certainly, if it be a corporate entity, it is in no position to urge that it is not responsible to its subscribers, or that it could not be held to answer under its contract to furnish legal advice and consultation upon all personal business or private matters, or that it will not defend in all civil or criminal actions brought against a member at any time in the police court or justice courts, without charge by its attorneys; or that it has not undertaken to give legal advice or information on all new state laws or ordinances of the city, or that it should not be bound to prosecute to the full extent of the law all persons committing crimes against the members from whom it has accepted a fee.

Counsel seek to avoid an inquisition of the conduct of the respondent by urging that its object as declared in its articles is lawful, and that its conduct is in line

with that of all of the prominent mercantile agencies in this country. If this were the end of our inquiry, it may be that respondent would be held to be within the law. But upon an inquiry of this kind we cannot conclude our investigation by a simple perusal of the articles, but are compelled to notice the conduct of respondent and inquire whether, in the pursuit of a lawful purpose, it has done or is doing that which may be condemned. Its certificate of membership challenges directly the recitation in its articles, i. e., "the collection of accounts and bills receivable due its members and subscribers." Its secretary, Mr. Cohen, says:

"It aims to give them the service as set out in that certificate there *and* to collect their bills, checks or notes or whatever they may have. . . . It simply brings the business men and the attorneys together."

We are convinced, therefore, that the respondent corporation is either a mere pretense for the gathering of money, without thought or intent of carrying out its declared object in good faith, or that, if it is a responsible body, it is engaged as a corporation in the practice of the law. It must take one position or the other. If it is the one, there is no legal excuse for its existence, certainly none for its doing business in the state of Washington, for it is no more than a broker soliciting legal business for lawyers who are to become principals in the transaction, which of itself would make them amenable to discipline. If it is the other, it is a principal doing business through its agents (its attorneys); it is violating the letter and the spirit of our law, as well as a sound public policy. If it is doing the things that it assumes to do in its articles, it is giving legal advice and counsel, and prosecuting without fee, other than the membership fee, the suits of its subscribers in the police and justice courts,

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and it is advising them upon all state laws and city ordinances, and will, if need be, prosecute criminally those who have offended against its membership. This is a practice of the law. *Meisel & Co. v. National Jewelers' Board of Trade*, 90 Misc. Rep. 19, 152 N. Y. Supp. 913; *Savings Bank v. Ward*, 100 U. S. 195; *Thornton, Attorneys at Law*, § 69.

The practice of the law is not a business that is open to a commercial corporation.

"Since, as has been seen, the practice of law is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts, and as these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot do so indirectly, by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate." 2 R. C. L. 946.

See, also, *In re Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. 15, 139 Am. St. 839, 32 L. R. A. (N. S.) 55.

The practice of the law is a personal right, and that the public may not be imposed upon by the unworthy, the law requires that those engaged in practice shall be men of good moral character and with certain qualifications and a degree of learning, to be ascertained by the agents, not of the courts, but of the whole people speaking through the legislative body. The right to practice law attaches to the individual and dies with him. It cannot be made a subject of business to be sheltered under the cloak of a corporation having marketable shares descendible under the laws of inheritance. One engaged in the practice of the law is subject to personal discipline for misconduct and to penalties for violating the ethics of the profession that could not possibly attach to a corporate body.

When stripped of all fabrication, the respondent has taken money from its subscribers under a contract of retainer to care for their legal business to the extent declared in its certificate of membership. This the law, as well as the policy of the law governing the admission and conduct of attorneys, forbids.

Other questions are raised in the briefs, but being satisfied that respondent is acting either in excess of its corporate powers or is, in fact, practicing law as a principal through its agents—for, if its certificate be a contract, it has engaged to do all that any reputable lawyer could do under a contract of employment—the judgment of the lower court will be reversed and a judgment of ouster directed.

MAIN, C. J., MITCHELL, MACKINTOSH, and TOLMAN, JJ., concur.

[No. 15032. Department One. January 6, 1919.]

PHILIP OLNEY *et al.*, Respondents, v. W. D. McNAIR
et al., Assessor and Treasurer of Yakima
County, Appellants.¹

TAXATION (2) — POWER OF STATE — INDIANS (10-1) — PERSONAL PROPERTY. Sheep and their increase, purchased with the proceeds of stock and its increase issued by the United States Government to an Indian upon a reservation as a ward of the government, are not subject to taxation; as the Indian is a ward of the government, which does not part with title by the issuance of property to him.

SAME. The fact that money was borrowed to care for the sheep, or that the owner had prospered and was an officer in a bank, does not discredit his direct evidence that no stock was ever purchased except with proceeds of issued property and its increase, or make him any the less a ward of the government.

Appeal from a judgment of the superior court for Yakima county, Taylor, J., entered March 28, 1918, in

¹Reported in 177 Pac. 641.

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Opinion Per TOLMAN, J.

favor of the plaintiffs, in an action to enjoin the collection of a tax, tried to the court. Affirmed.

O. R. Schumann and J. Lenox Ward, for appellants.
Carroll B. Graves, for respondents.

TOLMAN, J.—This is an appeal from a judgment setting aside as invalid and void the assessment and levy of taxes against certain personal property of respondents, and perpetually enjoining any attempt to collect the same.

Respondents, who are husband and wife, are of Indian blood, and are members of what is known as the Yakima Indian nation, or tribe, and reside on allotted lands still held in trust for them by the United States, in the Yakima Indian reservation, Yakima county, Washington. Appellants are the assessor and treasurer of Yakima county. It is alleged and admitted that, in the year 1917, the assessor listed and assessed, as the personal property of respondent Philip Olney, 1,500 sheep, placing an assessed valuation of \$6,000 thereon, and caused such assessment to be placed upon the tax rolls of the county for the purpose of the levying and collection of taxes thereon, and that taxes have been levied thereon according to the rate fixed for Yakima county, and that the same have been certified to the county treasurer for collection.

The complaint alleges:

“That the personal property aforesaid is the increase of personal property issued to the plaintiff Philip Olney by the United States pursuant to the acts of Congress providing therefor, and also was purchased with the rents, issues and profits from the allotments to plaintiffs, and said personal property consists wholly of said issued property and the increase and profits thereof and derived therefrom and derived

from the rents, issues and profits of the allotments to plaintiffs."

And further, that the listed and taxed property is not liable to taxation by Yakima county; all of which is denied by the answer. The proof tends strongly to show that Charles Olney, the father of respondent Philip Olney, while but a boy, went upon the reservation as early as 1865, and has since remained there; that he had nothing when he went there, that he attended the Indian school, worked as directed during school time and vacation, received his board and clothing, and that, after a time, the agent in charge issued to him three cows and a heifer, the first property which he ever had, and these with the increase amounted to some thirty head at the time of what is known as the Priestley issue. About the year 1889, Captain Priestley, then the agent in charge, having on hand a considerable number of cattle belonging to the United States, and branded "ID," signifying "Indian Department," assuming that the Indians had made such progress towards self-support as to warrant that action, and apparently acting under general orders from the government, made a general issue of cattle to the Indians then on the reservation, calling in the heads of families, ascertaining the number of children in each family, and basing the issue of cattle thereon. And, according to the testimony of Charles Olney, several head of cattle were then issued to him for himself, his wife, and his four children. The officer delivering the cattle to him specified which ones were for each individual member of his family; and while these cattle were run all together, and with those which Charles Olney formerly possessed, yet each child was taught to know its own cattle and the increase thereof, so that each member of the family,

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at all times, knew which cattle belonged to each member of the family. From time to time, steers and dry cows were sold, and the proceeds of the sales of those belonging to each child were invested in heifers, so that the number belonging to each child continued to increase.

About the time that Philip Olney became of age, it was found that he possessed some thirty or forty head of cattle, and at that time he began to distinguish his cattle from his father's, using his father's brand, but placing it in a different position or place upon his animals, so that they were always readily distinguishable from those belonging to his father and other members of the family. He continued to run his cattle with his father's, however, until about the year 1902, when the cattle were all sold, both his and his father's, and the proceeds of the sale were invested in sheep. Philip Olney, his father, and an uncle all invested in sheep, and handled their sheep together in a sort of partnership. In 1906, the uncle withdrew from the partnership and took away his share of the sheep and in 1915, Philip and his father divided the sheep, which they had held in common after the uncle withdrew, and each has since handled his affairs separately. All of the sheep now assessed as the property of respondents were acquired in the manner stated. Philip Olney never worked for wages or earned money except in caring for his stock; and his father, while having earned money by riding the range and as captain of the Indian police, testifies that all such earnings were used to support his family, as also was a considerable portion of the money which he derived from the sale of his issued stock and its increase. All of the testimony is to the effect that no stock was bought by Philip or his father except with the proceeds of the

sale of issued stock or its increase. It is admitted that, at the time Philip came of age, or when he married, his father and mother each gave him a cow or calf, so that he got a little more than his share of the stock. But we do not consider this of sufficient importance to change the situation or to interfere with the finding that the sheep assessed were, as alleged in the complaint, acquired from the increase of personal property issued to Philip Olney by the United States.

From the very beginning, the Federal Government has treated Indians and Indian tribes as wards of the nation, and they have at all times been under the care and control of a department specially charged with the duty of looking after their affairs, with the avowed intent and purpose of encouraging habits of industry, inducing them to engage in the raising of stock and the cultivation of the soil, to the end that they may become not only self-supporting, but useful, productive, and civilized members of the community in which they live. While, strictly speaking, no such thing as a tribal government now exists, or perhaps ever existed on the Yakima reservation, yet the residents thereof of Indian blood are, none the less, wards of the nation. In ordinary affairs, the individual who has shown ability so to do is, no doubt, permitted to conduct his own affairs. But the right and power of supervision still remains in the Federal government and may be exercised at any time. In the issue of personal property, the government does not part with its title absolutely, and may, whenever it sees fit, step in and prevent the sale or disposition thereof by its ward who is in possession, or may retake it entirely if deemed advisable.

The sole question here is whether such property is liable to taxation by the officers of the county where it

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is situated. In *United States v. Rickert*, 188 U. S. 432, the late Mr. Justice Harlan, in answering this question, said:

“The personal property in question was purchased with the money of the government and was furnished to the Indians in order to maintain them on the land allotted during the period of the trust estate, and to induce them to adopt the habits of civilized life. It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose.”

It has also been squarely held that not only the issued property is exempt from taxation for the reasons above mentioned, but also, and for the same reasons, the increase of the issued property, property purchased with the proceeds of the sale of the issued property, and property purchased with the proceeds of the sale of increase of issued property, is likewise exempt. *United States v. Pearson*, 231 Fed. 270. The case just cited reviews the authorities, treats the subject exhaustively, and announces a rule of law which should be, and is, decisive here.

We find nothing in the record which in anywise disputes, or even casts suspicion upon, the testimony offered to show that the property involved was all acquired with the proceeds of issued property and the increase of issued property. The fact that money was borrowed from time to time for use in the lambing season and to care for the sheep, does not raise a presumption that it was used for other purposes, so as to discredit the direct testimony of the witnesses that none of it was used to purchase stock, and that no stock of any kind was ever purchased by them except with the proceeds of issued property or increase

of issued property. The fact that Philip Olney appears to be a man of intelligence and of some education, that he has prospered in his affairs, or even that he is an officer and stockholder of a bank, does not overcome this testimony or make him any the less a ward of the government.

The judgment is affirmed.

MAIN, C. J., MACKINTOSH, MITCHELL, and CHADWICK, JJ., concur.

[No. 15044. Department One. January 6, 1919.]

J. W. PRALL, *Administrator etc., Appellant*, v. GREAT NORTHERN RAILWAY COMPANY, *Respondent*.¹

MASTER AND SERVANT (55, 155)—INJURIES—OPERATION OF RAILROADS—IMPUTED NEGLIGENCE—CONTRIBUTORY NEGLIGENCE. Negligence cannot be imputed in the sending of a brakeman back to protect the rear of a train from the fact that trains were expected from both directions; and the statement to him that the west-bound train might be the first to arrive did not warrant him in failing to protect himself against trains coming from the other direction.

SAME (192)—INJURIES—EVIDENCE—CAUSE OF DEATH—CONJECTURE. No recovery can be had for the death of a brakeman, sent back to protect the rear of a train, trains being expected from both directions, where there was no eyewitness to the accident and the cause of the death was left entirely to speculation and conjecture.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 17, 1918, upon granting a nonsuit, dismissing an action to recover for the death of a railway brakeman. Affirmed.

E. M. Heyburn, for appellant.

F. V. Brown and Thomas Balmer, for respondent.

MACKINTOSH, J.—On the night of December 15, 1916, three west-bound trains and two east-bound trains, all

¹Reported in 177 Pac. 637.

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operated by the respondent company, and all of them at the time more or less late and off their schedules, were to meet at the station at Libby, Montana. The deceased, William Shearer, was rear brakeman on one of the three west-bound trains. His train was to take the side track at Libby, behind a freight train which had been preceding it, and there await the arrival of the two east-bound trains, and after their departure, to proceed west. Arriving at the side track, it was found that, after accommodating the preceding freight train, the side track was not sufficiently long to hold Shearer's train in its entirety, and the major portion of the train remained standing on the main track after the head of the train had gone in on the side track. Under these circumstances it became necessary to send out the rear brakeman as a flagman to protect the rear of the train from collision. When sending Shearer out to perform this duty, his conductor called his attention to the fact that No. 3, being the west-bound train following Shearer's train, would possibly be the next train along; the testimony on this point being as follows:

"Q. Did you say anything to Shearer when you ordered him out, except to order him out? A. No, I told him to go back to flag, to protect the rear end, and I told him possibly No. 3 would be the first thing along. . . . Q. You did not know whether or not No. 3 was following you when you sent Shearer back? A. Oh, I knew they were somewhere around behind me. Q. But you did not know whether they were following you up or not? A. Oh, they could not be very close. They could not get by the time I had on them. Q. You did tell Shearer to look out for No. 3, didn't you? A. Yes, I told him."

After waiting at Libby some time, the two east-bound trains arrived, and as soon as the second of them had passed the west switch, the freight on the

side track ahead of Shearer's train moved out and Shearer's train moved into the clear on the side track, thus opening the main track to the two east-bound trains, and they passed on. The engineer of Shearer's train then signalled for Shearer to come in, and after waiting a reasonable time, during which No. 3 came in and passed on west ahead of Shearer's train, and Shearer having put in no appearance, the conductor started out to look for him, and about one and one-quarter miles east of the station, discovered a broken lantern and some exploded torpedoes. He proceeded a mile further and found nothing more; the next morning were found other fragments of lantern and torpedoes and Shearer's cap, in the same vicinity in which the conductor had found the lantern and torpedoes the night before, and two miles farther east, was picked up one of Shearer's arms, and at the next station, some six miles east of Libby, his body was discovered cut in pieces. At the close of the plaintiff's case, which developed the evidence as above recited, a nonsuit was granted.

Appellant claims that negligence can be imputed to the respondent in sending Shearer out to protect the rear of the train, but this cannot be. Quite the contrary would be the fact. With the rear end of the train standing on the main track, it would have been negligence and in direct violation of the rules of the company not to have sent out the rear brakeman to flag any oncoming trains. It is the custom and rule of the railroads to protect all trains stopping on the main track, by invariably placing flagmen at suitable distances, both in the rear and in front. This protection is called for without reference to any special circumstances and without any exceptions. Shearer was sent out to protect the train, not only against No. 3,

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but against all trains, and the statement to him by the conductor that possibly No. 3 might be the first train along was no assurance to him, nor did it warrant him in not protecting himself, against any other trains that might come from either direction. It was not such a statement as entitled the deceased to rely thereon, and was not made as a part of the train's operation. His knowledge of the situation was the same as that possessed by the rest of the train crew, and neither he nor they were sure whether No. 3 or one of the east-bound trains would pass the flagging point first.

The presumption that the deceased was performing his duty with care and caution applies as well, in the absence of evidence to the contrary, to the defendant's other employees operating the trains, and can, therefore, assist the appellant's case in no way. One offsets the other, for the presumption in favor of the deceased cannot lead to an inference that the operators of the train which struck him were negligent. *Looney v. Metropolitan R. Co.*, 200 U. S. 480; *Yarnell v. Kansas City, Ft. S. & M. R. Co.*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599.

The truth in regard to this unfortunate circumstance is that William Shearer was sent out to flag, which was part of his regular duties, and when the necessity for his continued performance of that duty had ceased he was called in, but never responded, and the reason for this is not known to any human being. The liability of the respondent cannot rest upon a conjecture. The appellant realized in drawing the complaint that the cause of Shearer's death is shrouded in mystery, for the charging part of the complaint reads as follows:

"Plaintiff believes from all the circumstances surrounding the accident to which there were no eye wit-

nesses, that the death of William Shearer was caused by acts and omissions of carelessness and negligence on the part of one or more of defendant's officers, agents and employes and that such acts and omissions constitute a just demand on the part of this plaintiff that the defendant make full explanation of the accident and in the absence of such explanation as a matter of defense, plaintiff alleges and reaffirms that William Shearer was killed through the negligence of defendant."

The proof was no more definite than this allegation, and was not such as to take the case out of the operation of the rule announced in *Parmelee v. Chicago, Milwaukee & St. Paul R. Co.*, 92 Wash. 185, 158 Pac. 977, where the cases relied upon by the appellant are discussed and distinguished.

Judgment affirmed.

MAIN, C. J., MITCHELL, TOLMAN, and CHADWICK, JJ., concur.

[No. 15052. Department One. January 6, 1919.]

MARY E. MILLER *et al.*, Respondents, v.
CARRIE E. GOLTZ *et al.*, Appellants.¹

CANCELLATION OF INSTRUMENTS (2)—FAILURE OF CONSIDERATION. A conveyance by an aged couple to a daughter in consideration of life support, fully performed on the part of the daughter, should not be cancelled for dissatisfaction on the part of one of the grantors because the daughter, through a mistake, instituted insanity charges against her mother; especially where such act was not wilfully and purposely wrong, and extensive improvements had been made on the property for the convenience of the grantors.

Appeal from a judgment of the superior court for King county, Hall, J., entered March 4, 1918, in favor of the plaintiffs, in an action to cancel a deed, tried to the court. Reversed.

¹Reported in 177 Pac. 687.

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H. M. Dalton, for appellants.

Shorett, McLaren & Shorett, for respondents.

MITCHELL, J. — Respondents, husband and wife, owned a home for twenty-five years, consisting of a house and lots in Seattle, which they conveyed to appellant Carrie E. Goltz in August, 1917, in consideration of the written obligation of appellants to furnish respondents future support and care. Within a few months Mrs. Miller became dissatisfied and, without the knowledge and consent of her husband, in the name of both, commenced and prosecuted this suit to a favorable judgment for a cancellation of the deed of conveyance.

There was no fraud in the inception of the conveyance. Respondents' rights to a cancellation depend upon the manner in which appellants have kept, or failed to keep, their promise.

The property was the community property of respondents, who have been married forty-eight years. He is ninety-two years of age and has not been able to perform much labor for nearly twenty years, the last two or three of which he has been an invalid. She is sixty-nine years of age, has always been industrious, and for the last twenty years, by her own efforts in keeping boarders and by occasional jobs at nursing, has largely maintained the home. The last two years she had no boarders nor work at nursing. She has a daughter by a former husband and five children by her present husband, of whom the appellant Carrie E. Goltz, wife of the other appellant, is the youngest. The children are all married and are without means beyond their own needs, though all of them have more or less contributed from time to time to the care and support of their parents, Carrie E. Goltz much more than the others.

The property had become heavily incumbered. Outstanding against it were a \$700 mortgage, some five or six years overdue, with interest unpaid; assessments for street improvements, delinquent and amounting to two or three times the original sum, with threat of foreclosure proceedings; and delinquent taxes. It appears the city authorities had made complaint of the unsanitary condition of the premises. Mrs. Miller had tried as best she could, without success, to sell or mortgage the property, or a portion of it, to meet their needs. Such were the conditions when, agreeably, and without the knowledge of the other children, the conveyance was made. According to the plan, Mr. and Mrs. Goltz moved into the house. He is a working man of good earning capacity and uses his money for his family. Not having sufficient means, he and his wife promptly borrowed \$1,200, giving their note and a six-year mortgage on the property, with the privilege of making monthly payments to take care of the old incumbrances and make improvements. All of this money, except a small amount still in the bank to pay for improving the basement of the house, was used by paying \$300 on the old mortgage, about \$450 to pay delinquent street assessments and general taxes, and about \$400 to improve and modernize the house. New electric wiring and running water were put in the house. A wash-bowl, toilet, bath tub, hot and cold water and sink in the kitchen were installed, and a cesspool established in the yard. Formerly, as shown by all the testimony, Mrs. Miller had been a neat and careful housekeeper, but the last year or more, being reduced in means and because of her advancing years, her invalid husband, who had become more helpless, had been neglected as to his personal cleanliness and the condition of his bedroom. Now he had been moved into a large, light,

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clean, bedroom, provided with clean bed clothes, his baths looked after and, together with his wife, had been supplied with all necessities in the way of food and other comforts.

Mrs. Goltz cleaned house and kept it so; Mr. Goltz helped the workmen with the improvements on the building and out in the yard. Mrs. Miller took part, and things went well for a few months; then the rather usual thing happened. Mrs. Miller began to chafe under a sense of lost control of the property, to which she was attached and by habit esteemed as her own. She sought the ready sympathy of two daughters against the changed conditions. The record in this case, all of which has been carefully read, shows that, with increasing annoyance, she was violent and abusive to her daughter Carrie, to the extent that the daughter became practically sick, and after seeking the advice of two old friends of the family (the friends not directing or meddling, however), had Mrs. Miller apprehended on a complaint of insanity. On this arrest, Mrs. Miller was confined in jail a few hours because the physicians summoned did not appear at the time needed for the inquiry. The examination of Mrs. Miller resulted in the dismissal of the insanity complaint.

Since then Mrs. Miller has refused to be reconciled, and shortly after brought this action. She occupies her room in the home, but declines invitations to take her meals there. A daughter, Mrs. Emily Chase, visiting for about a month, failed to persuade her. At the trial, Mrs. Miller testified as follows:

“Q. Now, then, you say you are afraid to eat there?
A. I would not eat a bite in that house, no sir, not out of their hands, because I would not touch them. Q. Are you afraid? A. I am not afraid, but I would not take a bite out of their hands. Q. You are not afraid.

The reason you would not take a bite out of their hands is because of your feeling against them, isn't it? A. Yes, I will never forgive them for trying to send me to an insane asylum when I was not deserving of it. Q. Well, that is the only reason, isn't it, that you feel against them so hard? A. Yes, sir, on account of this insane business."

Without question Mrs. Miller, for some years, has at intervals, for days at a time, engaged in very violent and abusive spells, such as the one leading up to the complaint of insanity. Mrs. Goltz and a sister so testify, as well as others not members of the family. On this subject, as well as his disposition towards the case, the treatment by his wife and his present treatment, Mr. Miller, whose mind is clear, being examined in his room before the trial judge, testified as follows:

"After Carrie and Emily went away, she never gave me a bath for a year. I never had a bath at all. And in the morning if I was unable to get up, she would wet a cloth and throw on the bed to me and sometimes it would be warm and sometimes it would be cold. If I would ask her, was there any warm water? She would say no, there ain't any warm water. . . . Q. Mr. Miller, did your wife tell you she was going to bring this suit to get those deeds cancelled? A. She did not. Q. Are you in favor of this suit to have the deeds cancelled? A. I am not. I am unqualifiedly opposed to it. I won't allow my name to appear in the complaint. I will not. I am perfectly satisfied with the deed as it is signed and want it to remain that way. Q. Would you be satisfied if the judge should have the deed cancelled and your daughter Carrie would have to go away and your wife live here alone? A. I won't live with her. Q. Why not? A. I will not, because she does not treat me well. Q. You want your daughter Carrie then to take care of her? A. I want my daughter, and Emily has come down from Chilliwack to assist her and she is stopping with her

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now to help her take care of the house and take care of me. I am well taken care of. Q. Mr. Miller, do you recollect a month ago or two when Mrs. Miller hit you or tried to hit you over the head with a newspaper? A. Oh, she got wild. Q. Do you recollect that? A. Yes. Yes. Q. Did she try to strike you with a newspaper when you were in bed? A. Yes. . . . Q. Does your daughter Carrie give you the kind of meals that you enjoy, and good food? A. She does. She gives me anything I ask for. Q. She has always been good to you? A. Been good to me? I could not ask better treatment. Q. Has she been kind to her mother, too? A. So far as I know. Her mother would not let anybody be kind to her. She is crazy. That is what is the matter with her and she has been for over thirty years. I have put up with all of these things, rather than break up a home and scatter the children."

The trial court, at the conclusion of the testimony and arguments of counsel, in passing on the case, observed:

"Mrs. Miller is perfectly sane and so, for that matter, is Mr. Miller. But it was working a hardship on her, having reached the age that she had, being gray-haired, and along in years, and to be charged with being of unsound mind and being confined in the jail for even just a short period of time was something that should have not been done to her and, while I do not believe that Mrs. Goltz when she swore out the warrant realized fully what would happen from the effects of it, it has left such a bitterness in Mrs. Miller's mind that it will be impossible for her for a long time, at least, to resume her normal relations with her daughter."

The law in this class of cases is well settled. In the case of *Gardner v. Frederick*, 96 Wash. 324, 165 Pac. 85, this court said:

"The rule in this state, as well as the great weight of authority, is to the effect that, where an aged par-

ent conveys property to a son or daughter, or other person, in consideration of future support and care, and there is a willful and wrongful withholding of such support and care, in equity the contract may be rescinded, or, if rescission cannot be had, an action for damages will lie. . . . The aged parent is entitled to respectful and considerate treatment, such as would naturally be prompted by the filial affection of a child. . . . There is some evidence that there was a deliberate attempt to withhold from her that gentle sympathy which not only would be prompted by filial affection, but which the law, in cases of this character, demands."

We are satisfied this rule does not define the conduct of appellants. Manifestly, there are nothing but trifles here, except the single instance of the insanity charge. It was an unfortunate mistake. But we must consider it from the viewpoint of Mrs. Goltz, and by the test determine if she was willfully and purposely wrong in making the complaint. The proof is wholly lacking to show any plan or scheme on her part to improperly get rid of her mother. The only persons to whom she spoke before making the complaint were old friends of her mother, and that for advice. It is obvious that she never for a moment thought or intended that her mother would be needlessly restrained. Again, while it is true that one's feelings become injured at a mistaken formal charge of unsound mind, yet the person preferring the complaint is to be censured or not according to the circumstances and motives prompting the act. There is nothing criminal or disgraceful in the possession of an unsound mind, whether the person be young or advanced in years, and often, in token of proper care, instead of remaining silent with reference thereto, it becomes one's imperative duty to have such matter inquired into, without the risk, necessarily, of being charged as unfaith-

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ful in the event physicians, after they see such person, decide there is no need of hospital care and treatment.

The proof in this case repeats a common story. Mrs. Miller, advanced in years, still surrounded by familiar scenes, influenced by the associations of long years, treasuring every nook and corner, tree and shrub about the place as her own, and having revelled with commendable pride in the rule of her own home, suddenly awakes to find her dominion not simply divided, but wholly gone, and it matters not into whose hands. The difficulty of accommodating herself to these new things frets and irritates. So far, she has refused to listen to counsel and entreaties, and seems to have forgotten that the venture was a joint one including her invalid husband, who confessedly is content and much better cared for than formerly. The situation is unfortunate for Mrs. Miller, and even considering that, because of the one mistake of the daughter, it will be some time before Mrs. Miller resumes her normal relations with her daughter, as remarked by the trial court, we do not find sufficient cause to cancel the conveyance; especially considering the work appellants have done, are doing, and are willing to continue, together with the personal obligations entered into by them for such purposes.

The judgment is reversed, with instructions to dismiss the action.

MAIN, C. J., TOLMAN, and CHADWICK, JJ., concur.

[No. 14499. Department One. January 9, 1919.]

JOHN E. LARSON, *Respondent*, v. L. E. MURPHY *et al.*,
Appellants.¹

TAXATION (153, 209)—FORECLOSURE—SUMMONS BY PUBLICATION—EVIDENCE TO SET ASIDE. In an action to set aside tax deeds, the evidence shows that plaintiff in a tax foreclosure used due diligence and was unable to locate the owner for personal service before resorting to service by publication, where it appears that diligent inquiry was prosecuted without success and that the owner had left the city without leaving any address.

SAME (163)—TAX TITLE—CONCLUSIVENESS—BURDEN OF PROOF. The burden is upon the owner who asserts the invalidity of a tax title to overcome the deed by competent and controlling evidence.

SAME (151-154)—FORECLOSURE—NOTICE TO OWNER. The owner of property is chargeable with knowledge of the delinquency of taxes and of every step in the tax foreclosure.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered August 10, 1917, in favor of the plaintiff, in an action to cancel deeds, tried to the court. Reversed.

Douglas & Schramm, for appellants.

Frank Oleson, Alfred C. Oleson (O. L. Willett, of counsel), for respondent.

MAIN, C. J.—The purpose of this action was to cancel and set aside deeds to real estate which had been made as the result of the foreclosure of two certain tax certificates of delinquency. The trial resulted in a judgment as prayed for in the complaint. From this, the defendants appeal.

The facts may be summarized as follows: The property involved is two vacant and unimproved lots in the city of Seattle. These were acquired by one John E. Larson sometime during the year 1905, and

¹Reported in 177 Pac. 657.

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he either paid or caused the taxes to be paid thereon up to and including the year 1911. The taxes for the year 1912 were not paid. On or about June 1, 1914, delinquent tax certificates were obtained by one R. H. Coshun from the county treasurer covering the two lots, who also paid the taxes for the subsequent years. In 1916, the holder of the delinquent tax certificates began actions to foreclose the same and sought to obtain service by publication. In these proceedings judgment of foreclosure was taken by default and, in due time, deeds issued and delivered to the holder of the certificates. Thereafter the property was transferred by quitclaim deed to one L. E. Murphy, who, together with his wife, are appellants in this action. As above stated, the trial court entered a judgment canceling and setting aside the county deeds to Coshun, and also the quitclaim deed from Coshun to Murphy. Larson, the owner of the property, was, at the time of the foreclosure of the certificates of delinquency, a resident of the county in which the property was located and in which the actions were brought.

The controlling question, as presented by the briefs, seems to us to be whether the holder of the certificates of delinquency, prior to resort to constructive service, had exercised ordinary diligence in an endeavor to locate and serve the owner personally. The appellants' contention is that Larson could not be found by the exercise of such diligence, and respondent makes the counter contention that he could have been found.

The procedure in each of the tax foreclosures was fair upon its face and shows a compliance with the statute. For the purpose of this case we may accept it to be the rule that, even though the procedure be fair upon its face and shows a compliance with the statute, yet, if there was not the exercise of ordinary

diligence in an endeavor to locate and personally serve a resident defendant, a tax title is vulnerable in a direct proceeding for that reason. Inquiry must be directed, then, as to what the record shows with reference to an endeavor to locate and personally serve the defendant in the tax foreclosure proceedings. The facts are not in dispute. The evidence shows that, prior to resorting to substituted service, the plaintiff in the tax foreclosure proceedings caused inquiry to be made by persons living in the vicinity where the property was located to ascertain where the owner of the property could be found. An endeavor was made to locate him through the Title Trust Company, and an investigation of the records in the office of the county treasurer. A letter was sent to John E. Larson, addressed care of Anton E. Larson, 1420 Boylston avenue, Seattle. This letter was returned unopened. The taxes for the year 1911 had been paid by Anton E. Larson, and the duplicate receipt kept in the treasurer's office showed his residence to be 1420 Boylston avenue. After process had been placed in the hands of the sheriff for service, a deputy sheriff visited the latter address seeking to find John E. Larson, and also made inquiry at a rooming house located at 1817 Ninth avenue, Seattle. For a few months prior to the month of March, 1916, John E. Larson had lived at this place. The sheriff being unable to locate him, made a return to that effect. Thereafter the statutory requirements for service by publication were complied with.

Specific mention is made in respondent's brief of the fact that, in the Seattle city directory for 1916, Larson's residence appeared as 1817 Ninth avenue, and also of the fact that the lady who operated the rooming house at the time he resided there and who, at the time the process was delivered to the sheriff

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in the month of August that year, was living a few doors away, visited the rooming house for the purpose of getting any mail that might come for Larson. This lady, however, testified that she had never received any mail there, and that she did not know where Larson was after he left the rooming house and during the time that the tax foreclosures were being prosecuted. The record fails to point out any manner in which it would have been possible to locate Larson in order that personal service might have been had upon him. From some time in March, when he left the rooming house, until subsequent to the foreclosure proceedings, he was working in a logging camp a mile or a mile and a half from Des Moines. Under these facts, the tax title cannot be disturbed because of the claim that ordinary diligence was not exercised in an endeavor to locate the owner of the property.

When a tax title is sought to be overthrown, the burden is on the one who asserts its invalidity to overcome the deed by competent and controlling evidence. *Sparks v. Standard Lumber Co.*, 92 Wash. 584, 159 Pac. 812.

The respondent's principal reliance seems to be placed upon the case of *Olson v. Johns*, 56 Wash. 12, 104 Pac. 1116. In fact, upon the oral argument it was stated that that case would sustain the judgment, but that case is obviously distinguishable from the present in at least two respects. First, there no attempt was made to locate and serve the owner personally. No search was made by the person making the affidavit, and the sheriff's return "Not found" was immediately made upon the presentation to him of the notice and summons and affidavit of nonresidence. Second, it was there affirmatively shown that the

owner of the property could easily have been located through the address given in the city directory. In the present case, as already pointed out, a search was made, not only by the holder of the certificates, but by the sheriff, and it affirmatively appears that there was no way of locating Larson through the address given in the city directory.

Upon the record, as we view it, the judgment cannot be sustained. The owner of the property was chargeable with knowledge that the taxes were unpaid; the duty rested upon him to see to their payment, if he would prevent his land being sold therefor; he was chargeable with knowledge of every step in the foreclosure procedure, including the fact that certificates of delinquency might issue for unpaid taxes and in due time foreclosure be had which would divest his title. *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385; *Sparks v. Standard Lumber Co.*, *supra*.

The judgment will be reversed, and the cause remanded with directions to the superior court to dismiss the action.

FULLERTON and PARKER, JJ., concur.

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Opinion Per TOLMAN, J.

[No. 14501. *En Banc*. January 9, 1919.]AUGUST BIEL, *Appellant*, v. UNION FUEL & ICE
COMPANY *et al.*, *Respondents*.¹

FRAUD (13, 18)—PLEADING—EVIDENCE—ISSUES AND PROOF. Where fraud was alleged inferentially as to representations concerning the financial condition of a company, latitude should be allowed in inquiring into the subject, although there was no direct allegation that the financial condition was misrepresented.

APPEAL (386, 387)—RIGHT TO ALLEGE ERROR—WAIVER. Plaintiff, having declined to amend his complaint upon the condition of a continuance, so as to make evidence admissible, cannot allege error in the exclusion of the evidence.

CORPORATIONS (56)—PREFERRED RIGHTS—TRANSFER—RESCISSION FOR FRAUD. A purchaser of "preferred rights" in a corporation affirms the sale, and cannot thereafter rescind, where, a year later, with knowledge of the alleged fraud, he accepted interest due under his contract.

SAME (31, 189)—PREFERRED RIGHTS—AUTHORITY TO ISSUE—ULTRA VIRES. The issuance of certificates of "preferred rights," under the corporation's general power to borrow money and incur indebtedness, is not *ultra vires*.

Appeal from a judgment of the superior court for Adams county, Davidson, J., entered May 22, 1917, upon findings in favor of the defendant, dismissing an action for equitable relief, tried to the court. Affirmed.

G. E. Lovell, for appellant.

Frederick W. Dewart, *Bert Linn*, and *L. H. Brown*, for respondents.

TOLMAN, J.—This action was brought to recover the purchase price paid by appellant for preferred rights issued by the Union Fuel & Ice Company, a corporation, one of the respondents, appellant alleging that he was induced to make the purchase and part with

¹Reported in 177 Pac. 813.

his money by false and fraudulent representations as to material facts, upon which he relied. Findings and judgment below were in favor of respondents.

Appellant alleges in his complaint, as constituting all of the representations made to induce the purchase by him, the following:

“That, leading up to the sale of the said ‘preferred rights,’ the said E. F. Waggoner made the following oral representations to this plaintiff:

“(1) That W. J. Lansing had told him, the said Waggoner, that the Union Fuel & Ice Company was doing a better business and was a better investment than the Ritzville Trading Company.

“(2) That the German American State Bank of Ritzville was better than any bank in Ritzville, but that an investment in the Union Fuel & Ice Company was better than an investment in any bank in Ritzville.

“(3) That the interest which said Waggoner was offering for sale in the Union Fuel & Ice Company was ‘preferred stock’ and bore interest at the rate of eight per cent per annum.

“(4) That defendant E. F. Waggoner was endeavoring to sell \$40,000 worth of ‘preferred stock’ in the Union Fuel & Ice Company; that the only indebtedness against said Union Fuel & Ice Company was a real estate mortgage, and the money to be derived from the sale of the said stock was to pay off a certain real estate mortgage amounting approximately to \$25,000.

“(5) That one C. H. Clodius had invested \$1,000 in the Union Fuel & Ice Company.

“(6) That one F. E. Robbins, who was then and there a very rich man, had invested \$1,000 in ‘preferred rights’ of the Union Fuel & Ice Company.

“That all of said representations were false, and were known to the maker thereof to be false, and were made with the intent to cheat and defraud this plaintiff, and that if the said representations and each and

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all of them had not been made, then this plaintiff would never have purchased the so-called 'preferred rights,' and would not have given defendants the sum of \$5,000."

It will be observed that there is no direct allegation in the complaint that the financial condition of the Union Fuel & Ice Company was misrepresented. Assignments of error one, two, and three are based upon the refusal of the trial court to admit certain evidence relating to the financial condition of the Union Fuel & Ice Company, and certain representations said to have been made to others as to its financial affairs.

While it is true that, when fraud is charged, the court should allow the greatest latitude, especially in the examination of hostile witnesses, yet that rule does not require the court to listen to evidence wholly outside the issues and which has no bearing upon the representations which are alleged to have been fraudulently made. Still, in this case, the fraudulent representations, as alleged in the complaint, if made and if false, were, inferentially at least, made for the purpose of showing that the financial condition of the company was better than the facts warranted, in order to induce appellant to purchase, and we think inquiry should have been permitted into the subjects covered by these assignments, even though there was no direct allegation that the financial condition of the company was misrepresented. The trial court, however, upon the request of appellant, allowed an amendment of the complaint so as to make such evidence admissible, conditioned (because of respondents' claim of surprise) upon a continuance of the cause at the expense of the appellant, which condition was within the discretion of the court; and, appellant

having refused to amend upon that condition, and having elected to submit his case upon the evidence already admitted and before the court, cannot now complain of the refusal to receive the evidence referred to.

We think there was another reason why all of such evidence, if admitted, could not be permitted to change the result. While it is true that appellant was an old man some 76 years of age, it does not appear that his faculties, other than his hearing, were to any extent impaired, and it does appear that, after full knowledge of all of the conditions, the appellant, by his own act, affirmed the sale. The undisputed testimony shows that, more than a year after the sale, the appellant, with as full knowledge of conditions as he had at the time of the trial, demanded the dividends upon the preferred rights in question, which we think showed an election to affirm the sale and retain the preferred rights as his own, because upon no other theory would he be entitled to the dividends. And even after the complaint in this action was prepared and served, but not yet filed, appellant's attorney wrote to the respondent's attorney, saying:

"I don't know whether it will have any effect, but whether this matter comes on to be heard or not, I will file all papers in court next week, and will tell the Ritzville correspondent of the Spokesman-Review to notify his paper of the filing, unless this year's interest is forthcoming. If this year's interest is paid to my clients, of course, I would be willing to wait till the end of the fall before proceeding further, in order to give your company a chance to get in some other sucker to take their place."

Here was an open and avowed attempt to induce the company to pay the interest on the preferred rights, which, as we have said, could only be received by appellant as the owner of such rights, and shows

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an election to retain the rights and receive the income thereon at a time when he must have known all of the facts upon which he relies in this cause. Under the rule long followed by this court, appellant has affirmed the sale. *Thomas v. McCue*, 19 Wash. 287, 53 Pac. 161; *Eldridge v. Young America etc. Min. Co.*, 27 Wash. 297, 67 Pac. 703; *Angel v. Columbia Canal Co.*, 69 Wash. 550, 125 Pac. 766; *Pearson v. Gullans*, 81 Wash. 57, 142 Pac. 456; *Blake v. Merritt*, 101 Wash. 56, 171 Pac. 1013.

The other and final assignment of error is: "The court erred in entering up the final judgment and decree dismissing the case." Under this assignment it is argued that the issuance of the preferred rights by the Union Fuel & Ice Company was *ultra vires*, and that those rights are void and of no effect. There is an allegation in the complaint to this effect, but appellant seems to have overlooked this point entirely in the trial below, and when assigning errors and preparing his brief, and only raises it here under the guise of additional authorities. This identical question was presented to this court in *Johnston v. Spokane & Inland Empire R. Co.*, 104 Wash. 562, 569, 177 Pac. 819; and while the decision in that case is based upon laches, yet the court does say:

"This instrument, while it was neither capital stock nor an incumbrance upon the property, was undoubtedly an instrument acknowledging indebtedness and agreeing to pay dividends and interest for the money received and a considerable bonus in addition thereto."

No reason is now perceived why respondent might not issue these preferred rights under its general power to borrow money and incur indebtedness in carrying out its corporate purposes, and as appellant pur-

chased knowing just what he was purchasing, he should not now be permitted to complain.

Judgment affirmed.

All concur.

[No. 14550. Department Two. January 9, 1919.]

JOHN WILBUR HARTFORD, *Respondent*, v. M. S. STOUT
et al., *Appellants*.¹

REPLEVIN (52)—JUDGMENT—APPEAL—DECISION—OFFSET. Upon affirmance of a judgment in replevin for the return of an automobile or its value, the debtor cannot, by paying off a mortgage on the automobile, acquire an offset against the amount of the recovery for the value at the time of the rendition of the judgment in the trial court.

APPEAL (493, 498)—DECISION—REMAND—MODIFICATION—RECALL OF REMITTITUR—LEAVE TO ATTACK. The supreme court, having affirmed a judgment in replevin for the return of an automobile or for its value, will not recall the remittitur in order to deduct the amount of a mortgage lien, paid off by the judgment debtor subsequent to the judgment; since such payment did not affect the merits, and appeals must be determined on the record made below; but leave will be granted to apply to the trial court for any relief to which he may be entitled, treating the judgment as one of final determination in that court.

Motion to recall a remittitur, filed in the supreme court July 11, 1918, or for leave to apply below for relief from a judgment. Motion to recall remittitur denied; other relief granted.

L. H. Brown, for appellants.

W. B. Mitchell, for respondent.

FULLERTON, J.—The appellant Stout, holding a judgment against the father of the respondent, caused a writ of execution to be issued thereon. The sheriff,

¹Reported in 177 Pac. 666.

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in executing the writ, seized an automobile to which the father had the apparent title, but ownership of which was claimed by the respondent. The respondent brought an action in the superior court to recover the automobile, and, after issue joined and a trial had, obtained a judgment for its return, or in case return thereof could not be had, for its value in the sum of \$400. An appeal was taken to this court from the judgment, which, after a hearing upon the merits, was affirmed. *Hartford v. Stout*, 102 Wash. 241, 172 Pac. 1168.

At the time of the seizure of the automobile by the sheriff, there was a mortgage thereon in the sum of \$266, which the respondent was obligated to pay. On taking the appeal, before mentioned, the appellant satisfied or purchased the mortgage and sold the automobile. After the affirmance of the judgment by this court and the going down of the remittitur, the respondent caused an execution to issue on the judgment, whereupon the appellant made application to this court to recall the remittitur and enter upon an inquiry concerning the payment of the mortgage, and if it found the mortgage paid, to order the amount paid credited upon the value of the automobile, returning a remittitur reducing the amount necessary to satisfy the judgment by that sum; or, in the alternative, to grant the appellant leave to apply to the lower court for relief.

From the foregoing statement, it is at once apparent that the first remedy suggested is unavailing. There was no error in the judgment of the trial court with respect to the mortgage. At the time the judgment was entered, the appellant had not paid the mortgage debt, and had the option of either returning the automobile with the mortgage upon it or paying the judgment for its value, leaving the obligation of the re-

spondent to satisfy the mortgage debt still outstanding. It is manifest, therefore, that the appellant had no offset against the amount of the recovery for the value of the automobile at the time of the rendition of the judgment in the trial court, and this being so, it is equally manifest that the subsequent payment could not affect the merits of the cause on the appeal. This court must determine appeals upon the record as made in the trial court, and hence could not then, and cannot now, take cognizance of the fact that the appellant has relieved the automobile of the mortgage lien. It cannot, therefore, recall the remittitur and deduct the amount paid upon the lien from the amount of the recovery allowed for the value of the automobile.

But since we hold that a judgment of the superior court, appealed to this court and determined upon its merits, becomes a judgment of this court, and one which the superior court is without power, after its remand, to change or modify without leave of this court (*In re Shilshole Avenue*, 101 Wash. 136, 172 Pac. 338), and since it may be that the appellant has some remedy in the court of original jurisdiction to relieve himself from the situation in which he finds himself placed, we think he is entitled to the alternative relief for which he asks.

Leave therefore is granted to the appellant to apply to the trial court for that relief to which he deems himself entitled; it being intended hereby to grant to the trial court leave to entertain any such appropriate proceeding as it would be entitled to entertain were the judgment one of final determination in that court, but not to determine whether any such relief exists, nor the form thereof, if one is found to exist.

MAIN, C. J., PARKER, MOUNT, and HOLCOMB, JJ.,
concur.

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[No. 14912. Department Two. January 9, 1919.]

THE STATE OF WASHINGTON, *on the Relation of John
W. Hartford, Plaintiff*, v. THE SUPERIOR COURT
FOR SPOKANE COUNTY, *R. M. Webster,
Judge, Respondent.*¹

APPEAL (493)—DECISION—MODIFICATION—LEAVE TO ATTACK. The rule that the trial court cannot enjoin execution upon a judgment affirmed by the supreme court, will not be enforced, where the supreme court had granted a judgment debtor leave to apply to the trial court for such relief as he may be entitled to; since the rule is one of policy and of doubtful application under the circumstances.

Application filed in the supreme court July 17, 1918, for a writ of mandate to compel the superior court for Spokane county, Webster, J., to vacate an order restraining the issuance of an execution on a judgment of the supreme court. Denied.

W. B. Mitchell, for relator.

L. H. Brown and *W. C. Meyer*, for respondent.

FULLERTON, J.—This proceeding grows out of the case of *Hartford v. Stout*, 102 Wash. 241, 176 Pac. 1168. After the return from this court of the remittitur in that case, an execution was issued on the judgment. After the issuance of the writ of execution, the judgment debtor began an action in the superior court in which the judgment was entered to enjoin the execution of the writ. In the action a temporary restraining order was issued, whereupon the judgment creditor applied to this court for a writ directing the trial court to vacate the restraining order and dismiss the action, basing his application upon the ground that the court

¹Reported in 177 Pac. 654.

was without jurisdiction to entertain the action, since the judgment on which the execution was issued was appealed to this court and affirmed upon its merits, thereby becoming a judgment of this court which could not be attacked in the superior court without leave of this court.

An alternative writ was issued by this court, to which the trial judge has made answer, and the judgment creditor has himself appeared and filed objections to the proceedings. The controversy at the final hearing took a somewhat wide range, but in determining the issue presented we have not found it necessary to follow the parties. Since the relief sought by the complaint is more in the nature of a set-off against the judgment than it is for a modification of the judgment, it may be seriously questioned whether the rule sought to be invoked by the judgment creditor has any application. But, further than this, we have, in an application pending at the time this present application was made, granted leave to the judgment debtor to apply to the court of original jurisdiction for such relief as he may deem himself entitled to. It may be that he desires to pursue the pending action. If he does so desire, it would be a waste in costs and an unnecessary exaction upon the time of the trial court to order the action dismissed, when the only effect would be to drive the judgment debtor to the immediate institution of a similar action. The fact that the application may have preceded the grant of leave is not controlling. The rule itself is one of policy, the violation of which the court has power to waive. In this instance, since we find the rule of doubtful application and find nothing contumacious in its seeming violation, we deem it proper to exercise that power.

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The alternative writ is quashed, and the application for the peremptory writ denied.

MAIN, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ.,
concur.

[No. 14763. Department Two. January 9, 1919.]

CARL BIRD, *Appellant*, v. VOLNEY B. COX *et al.*,
Respondents.¹

MORTGAGES (212, 213)—FORECLOSURE—SALE—SHERIFF'S RETURN—AMENDMENT. After confirmation of a mortgage foreclosure sale, at which the purchaser bid and paid the full amount claimed as due by the sheriff, whose return showed satisfaction of the judgment, the return cannot be amended to show a deficiency, although the mistake as to the amount was inadvertent, where mortgagors, liable on the judgment, had secured the purchaser under an agreement to convey their equity of redemption; since they could not recoup their loss by redemption and there was no excuse for failure to object to the return before confirmation.

Appeal from an order of the superior court for Franklin county, Truax, J., entered March 5, 1918, denying a motion for an order to amend a sheriff's return of sale on execution, after a hearing before the court. Affirmed.

Zent & Powell, for appellant.

Gerard Ryzek, for respondents.

HOLCOMB, J.—Respondents mortgaged certain property to appellant, after which they sold the property to defendants Riggs and wife, who assumed the mortgage debt. In foreclosure proceedings, defendants Riggs defaulted, and judgment was taken against defendants Riggs as well as respondents. Respondents also secured judgment against defendants Riggs.

¹Reported in 177 Pac. 675.

After the sheriff had prepared notices of sale under the execution of foreclosure, he sent copy thereof, with letter of transmission, to appellant's attorney, as follows:

"Am inclosing notice for publication for your inspection. If there are any errors kindly notify me at once so correction can be made. Total sum was arrived at as follows:

Judgment	\$850.00
Interest from Jan. 2, 1916, to Nov. 12, 1917.	96.34
Interest from Nov. 12 to Dec. 22, 1917.....	9.45
Attorney's fee	100.00
Sheriff's fee	10.55
Costs	17.50

"\$1,083.84"

Reply was made by appellant's attorneys to the sheriff, as follows:

"The notice of sale which you prepared in Bird v. Cox and forwarded us a copy seems to be in order.
. . ."

The sale, upon motion of appellant, was duly confirmed by the court. The sheriff's return showed satisfaction of the judgment. The purchaser paid the amount as stated by the sheriff and shown in the notice of publication as the amount due on the judgment and which had been acknowledged by appellant's attorney to be in order. Some time after the order of confirmation of sale was made, appellant moved for an order to amend the sheriff's return to show a deficiency.

Respondents objected by affidavit showing that they had secured a purchaser at execution sale, with the agreement that they would convey their equity of redemption to the purchaser; that the purchaser bid the full amount stated by the sheriff as due on the indebtedness; that, if deficiency is now secured, respondents

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could not recoup their loss by redemption of the real estate or against the insolvent defendants Riggs; that error of sheriff was caused wholly by the negligence and carelessness of appellant and his attorneys, and that, if now the return should be amended, it would cause loss and injury to the respondents without their fault. The court denied the motion to allow the amendment of the sheriff's return.

It would certainly be inequitable to allow an amendment of the sheriff's return of sale which would cause a loss to innocent parties, when the error, even though "inadvertent," occurred through the carelessness and negligence of appellant's attorneys, and a correction of the same was not asked until after appellant procured a confirmation of the sale. There is no sufficient excuse offered why appellant did not urge his objections to the sheriff's return at the time of the confirmation. In *Otis Bros. & Co. v. Nash*, 26 Wash. 39, 66 Pac. 111, it was said:

"All these irregularities were cured by the order of confirmation. Having regard to the stability of real estate titles, an order confirming a sheriff's sale must be held to be more than a mere formal order. It is the solemn declaration of the court that the sale has been regularly and legally made, and those who would be in position to avoid the consequences of such order must pursue the method outlined by statute by making objections in time, so that the entry of the order may be prevented, or, if entered, may be reviewed by the appellate court if desired."

The statute, Rem. Code, § 587, provides among other things that

"The sheriff shall proclaim aloud at the place of sale, . . . He shall also state the amount which he is required to make upon the execution, which shall include damages, interests, and costs up to the day of sale, and increased costs."

As will be seen from the above, plaintiff also could have corrected the sheriff at the sale, if the sheriff announced an erroneous amount; or, in any event, brought the matter up for correction before the confirmation. We think that, in justice to the parties, appellant's motion after the confirmation order was untimely.

The judgment must be and is affirmed.

PARKER and MOUNT, JJ., concur.

MAIN, C. J., and FULLERTON, J., concur in the result.

[No. 14793. Department Two. January 9, 1919.]

WESTERN HARDWARE & METAL COMPANY, *Respondent*, v.
MARYLAND CASUALTY COMPANY, *Appellant*.¹

MUNICIPAL CORPORATIONS (158) — SCHOOLS AND SCHOOL DISTRICTS (28)—CONTRACTOR'S BONDS — PERSONS SECURED — SUPPLIES. A bond given by a contractor in compliance with Rem. Code, § 1159, to secure all persons furnishing provisions and supplies for carrying on the work of constructing a heating plant in a schoolhouse, covers sums due for sheet metal furnished in good faith to a subcontractor to be used in the building, although, due to the fault of the subcontractor, all of it was not used in the construction of the plant.

SAME—LIABILITY. Liability attaches in such case, although the sheet metal was not delivered at or near the school building, where the delivery was made at the shop of the subcontractor, it being necessary to there prepare it for use on the job, and the work of preparing it was being actually done there.

Appeal from a judgment of the superior court for King county, Smith, J., entered March 5, 1918, upon findings in favor of the plaintiff, in an action on a contractor's bond, tried to the court. Affirmed.

Grinstead & Laube, for appellant.

F. C. Kapp, for respondent.

¹Reported in 177 Pac. 703; 181 Pac. 700.

PARKER, J.—The plaintiff, Western Hardware & Metal Company, seeks recovery upon a bond executed by the defendant, Maryland Casualty Company, as surety, under Rem. Code, § 1159, relating to security for the furnishing of labor, material and supplies for the carrying on of public work. Trial in the superior court for King county, sitting without a jury, resulted in findings and judgment in favor of the plaintiff, from which the defendant has appealed to this court.

The controlling facts may be summarized as follows: On May 15, 1916, Musgrove & Blake, copartners, entered into a contract with Seattle School District No. 1, by which they agreed to furnish the material for, and install, a heating and ventilating plant in the West Queen Anne schoolhouse, for the sum of \$12,758. On May 20, 1916, Musgrove & Blake, as principals, and appellant casualty company, as surety, executed a bond in the sum of \$19,137 to secure the faithful performance of the contract, and also conditioned, as provided by Rem. Code, § 1159, that Musgrove & Blake:

“Shall pay all laborers, mechanics, and subcontractors and materialmen, and all persons who shall supply such person or persons or subcontractors with provisions and supplies for the carrying on of such work. . . .”

On May 29, 1916, Musgrove & Blake sublet the furnishing and installing of the sheet metal work of the heating plant to Joe Zimmerer, doing business as Zimmerer Manufacturing Company, whereby he agreed to furnish the material for, and install, all the sheet metal work of the plant for the sum of \$2,167; Zimmerer then being the owner of and conducting a sheet metal shop in Seattle wherein he pressed and worked sheet metal into such form as was necessary for whatever jobs he might have had on

hand. On June 2, 1916, Zimmerer, not having sheet metal on hand for the performance of his subcontract, purchased from respondent, Western Hardware & Metal Company, of Seattle, dealers in heavy hardware of that nature, sheet metal of the value of \$766.93, for the purpose of performing his subcontract, with the distinct understanding on the part of both himself and the respondent that the sheet metal so furnished was for his subcontract and was to go into, and become a part of, the heating and ventilating plant. Soon thereafter the whole of the sheet metal so purchased by Zimmerer of respondent was delivered by respondent to him at his shop. Thereafter, on June 5, 1916, respondent notified Musgrove & Blake that it had so furnished and delivered to Zimmerer material for the performance of his subcontract, and that they and their surety would be held for the payment of the purchase price therefor, and also advising them of the amount of the purchase price. This notice was given strictly in compliance with the provisions of § 1159-1 of Rem. Code, respondent manifestly having in view the possible necessity of a suit upon the bond to recover the purchase price of the material so furnished. The material was delivered by respondent to Zimmerer at his shop, because it was there that Zimmerer was going to press the sheet metal into form for use in the construction of the heating plant. It was material well adapted to that purpose, and we think the evidence plainly warrants the conclusion that it would necessarily have to be pressed into proper form for use in the structure at some shop having proper tools and appliances therefor, rather than upon the premises where it was to be finally put in place. It is plain, we think, that Musgrove & Blake knew that Zimmerer was going to do the pressing and shap-

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ing of the material in his shop, and that he was doing so with the express knowledge and consent of Musgrove & Blake. Only about \$140 worth of the material so furnished and delivered actually went into and became a part of the structure. To this extent appellant casualty company conceded that respondent was entitled to recover upon the bond, and made tender of that amount accordingly. Before completing his subcontract, Zimmerer went into bankruptcy and failed to complete it. What became of the portion of the metal so furnished by respondent which did not go into the plant does not appear with certainty, though the evidence points to the conclusion that Zimmerer disposed of it elsewhere. It is plain that respondent was in nowise responsible for the failure of Zimmerer to place all of the sheet metal in the plant. On March 7, 1917, the contract being completed by Musgrove & Blake with other sheet metal so far as was necessary, the plant was accepted by the school district. On March 13, 1917, respondent, not having been paid for the material so furnished by it to Zimmerer, filed its claim therefor against the bond with the proper officers of the school district. This was done timely and in strict compliance with Rem. Code, § 1161, with a view to enforcing the claim of respondent against the bond and appellant as surety thereon. Soon thereafter this action was commenced, resulting in judgment rendered therein as above noticed.

It is contended in appellant's behalf that it is not liable upon its bond for the purchase price of that portion of the sheet metal furnished by respondent which was not actually used in the construction of the heating and ventilating plant. Counsel for appellant invoke the law announced in some of the lien decisions, holding that actual use of material in the construction

of a building is indispensable to the creation of a lien right in the one furnishing it. We have recognized that there is generally an analogy between mechanics' and materialmen's lien statutes and bonding statutes such as ours, since the latter are generally for the purpose of providing security for labor and material in lieu of security therefor by lien upon property which would be subject to lien under private ownership. This analogy, in so far as a claimant's rights as against the property or the bond are concerned, would seem to be complete when both the lien and bonding statutes define the work and material the payment for which is secured by the lien or the bond, in substance the same. *Clough v. Spokane*, 7 Wash. 279, 34 Pac. 934; *National Surety Co. v. Bratnober Lumber Co.*, 67 Wash. 601, 122 Pac. 337. Our mechanics' and materialmen's lien statute, in so far as it specifies the furnishing of material for which a lien may be asserted by the one furnishing it, reads:

"Every person . . . furnishing material to be used in the construction . . . of any . . . building . . . has a lien upon the same for the . . . material furnished by each, respectively, . . . and every contractor, subcontractor, architect, builder or person having charge, of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this chapter." Rem. Code, § 1129.

Our bonding statute, in so far as it relates to the securing of payment for material, provisions and supplies for the carrying on of public work, provides that such bond shall be conditioned that the contractor shall:

" . . . pay all laborers, mechanics and subcontractors and materialmen, and all persons who shall supply such person or persons, or subcontractors, with

provisions and supplies for the carrying on of such work, . . .” Rem. Code, § 1159.

It would seem, therefore, that, since our lien statute secures by lien payment for “furnishing material *to be used in the construction*,” etc., and our bonding statute provides for the securing by bond the payment of “subcontractors and materialmen and all persons who shall supply such person or persons, or subcontractors, with provisions and supplies for *the carrying on of such work*,” there is an analogy between these statutes, in so far as we are here concerned with the question of the necessity of the material furnished by respondent going into the structure of the plant in order to give respondent the right of recovery upon the bond. We are not here concerned with provisions and supplies which are not intended to go into the structure but which are consumed in carrying on the work, the payment for which our bond statute contemplates securing by the bond, but which our lien statute does not secure. These observations, we think, render it plain that the mechanics’ and materialmen’s lien decisions are as applicable and helpful in our present inquiry as bond decisions.

In the early decision of this court in *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1073, there was involved a claim of lien made by one furnishing material to a contractor engaged in the construction of a hotel building for the owners of land upon which it was situated. Disposing of the contention that the plaintiff furnishing the material could not have a lien upon the building and property because the material so furnished by him did not actually go into and become a part of the structure, though furnished for that purpose, Judge Scott, speaking for the court, said:

"Said plaintiffs claimed a lien for materials furnished for said hotel to said Potvin as contractor, amounting to \$21,000, and it appears that of this amount only \$2,300 was used in the construction of the building, said building never having been completed, and said contractor having abandoned work thereon. It is contended by the appellant, the Denny Hotel Company, that there can be no lien for materials furnished which were not used in the construction of the building; and it is further contended that a right to a lien for the materials that were used was lost in consequence of the respondent having intermingled said claim with the claim for materials not used. It is conceded that said materials were all furnished under a contract between said respondent and said contractor, and that the same were specially designed and made for said building, and are necessary to the completion of the building; that they have been delivered and are now upon the premises at the building. It further appears that the only reason why the same have not been used is in consequence of the contractor having suspended work. Under such circumstances we think the right to a lien for all of said materials exists."

At the time of the rendering of that decision, the portion of the lien statute above quoted was the law, as it now is, though that section was thereafter in some other respects amended. Since then there have been some other decisions rendered by this court which counsel for appellant rely upon as a modification of the view of the law there expressed. One of those is the case of *Puget Sound State Bank v. Gallucci*, 82 Wash. 445, 144 Pac. 698, Ann. Cas. 1916A 767. That case involved a claim of the bank against the surety upon a bond given under our bond statute, above quoted, but with an additional condition in the bond rendering, as we then thought, the surety liable upon the bond for the payment of debts incurred in the performance of the work, in the sense that it was

liable for the repayment of the money borrowed by the contractor and used in the payment of debts incurred in the performance of the work. In that case the trial court awarded judgment against the bond for the money so borrowed and used, taking pains, however, to limit the bank's recovery to an amount equal to the money so borrowed which could be traced into payments made therefrom for labor actually performed and material actually furnished in the carrying on of the work. We affirmed that holding of the trial court, and were not called upon to determine whether or not the surety was liable to any greater extent. This, we think, is not a holding in the least contrary to the view of the law expressed in the *Denny Hotel* case, above quoted from.

Another of our decisions relied upon as lending support to this contention made in appellant's behalf is that in *Lipscomb v. Exchange National Bank*, 80 Wash. 296, 141 Pac. 686, which involved the claim of an architect for a lien securing his claim of compensation for preparing plans for a building which was not constructed. A critical reading of that case, however, will show that the architect was held not entitled to a lien upon the land, because of his knowledge of the possible impracticability of the scheme by which it was to be financed, the fact that he had agreed to be compensated in part by interest bearing obligations of the corporation undertaking the project, the fact that he had been paid in cash to the extent agreed upon, and the fact that the project failed of consummation because of the failure of the contemplated financing scheme. Another of our decisions relied upon by counsel for the appellant is that in *State Bank of Seattle v. Ruthe*, 90 Wash. 636, 156 Pac. 540, wherein there was involved a claim against a contractor's bond

for the labor of teams furnished in carrying on the work, and it was held that the claim was allowable as against the bond only for the actual number of days the teams so labored, though they were in the possession of the contractor a larger number of days. We think that case is not controlling here, since the only thing furnished was the labor of the teams while they were actually employed on the work.

The decisions of the courts of other jurisdictions are seemingly out of harmony upon the question of the necessity of material being actually used and becoming a part of the structure in order to sustain a lien for the value thereof in favor of one furnishing such material. This conflict, however, we think, may, in many instances, be regarded as more apparent than real, and as growing out of the difference in the language of the different statutes giving the right of lien. Of course, where a statute by its terms gives a lien right only for material actually going into and becoming a part of the structure, as some of them do, such a condition is necessary to support a claim of lien thereunder; but such are not the terms of our lien or bond statute.

In the early case of *Hinchman v. Graham*, 2 Serg. & R. (Pa.) 170, a view of the law was expressed with which our *Denny Hotel* case, above quoted from, is in full harmony. In that case the material seems to have been furnished by a materialman to the owner of the building to be used in the construction thereof, which material was not used therein, such failure not being the fault of the materialman. In holding that it was not necessary that the material go into and become a part of the structure as a prerequisite to the materialman's rights, Chief Justice Tilghman said:

" . . . The act of assembly makes the house subject to all debts 'contracted for or by reason of any

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materials found and provided by any lumber-merchant etc. *for or in the erecting and constructing of such house*'; that is to say, furnished *for* the erection of the house, or used *in* the erection of the house. The expressions seem intended to meet the very case which has occurred. The merchant having sold and delivered the materials, for the purpose of being used in the building, could do no more; it would be unjust, therefore, to throw upon him the risk of their future application. But it is said, that there is a distinction between materials delivered *at or near* the building, or at a *distance* from it; but I cannot see it, provided the delivery *at a distance* was in the *usual course of business*, as it was in this case. It is customary to prepare part of the carpenter's work at the shop; why then should the boards be thrown down first at the building, in order to be taken up again and carried to the shop? The delivery at one place or another, is no further important, than that it furnishes evidence of the purpose for which the materials were sold. The act of assembly makes no mention of the place of delivery. . . . I am of the opinion, that the account of C. & J. Remington should be allowed as a lien, although the lumber was not delivered *at or near* the house, or *used in the building of the house*."

In *White v. Miller*, 18 Pa. St. 52, Chief Justice Gibson, speaking for the court, adhered to this view of the law and held it applicable to the claim of a materialman furnishing material to a contractor instead of to the owner direct, observing in part as follows:

"As soon as owners of lots ceased to be their own builders, they put it in the power of the persons employed by them to occasion losses to mechanics and materialmen which they ought not to bear; and it was to remedy this mischief that the legislature established the principle that materials and labor are to be considered as having been furnished on the credit of the building, and not of the contractor. The principle is not only a just but a convenient one. Whether the builder be the agent of the owner or an independent

contractor, his appointment to the job creates a confidence in him which was not had before; and the consequences of a false confidence ought not to be borne by those who had no hand in occasioning it.”

In *Beckel v. Petticrew*, 6 Ohio St. 247, there was involved a claim of lien for material which did not go into or become a part of the building. In holding that the one furnishing such material in good faith for the construction of the building had a lien therefor, Judge Scott, speaking for the court, said:

“The first section of the act referred to provides ‘that any person who shall furnish materials for erecting or repairing any house or other building, by virtue of an agreement with the owner thereof, shall have a lien,’ etc. We think a fair construction of this section must extend the lien to all the material in good faith furnished *for the purpose of* erecting or repairing a house in pursuance of an agreement with the owner, notwithstanding a part of the material may subsequently be otherwise appropriated without the consent of the party furnishing it.”

In *Berger v. Turnblad*, 98 Minn. 163, 107 N. W. 543, 116 Am. St. 353, there was involved a claim of lien for work upon material furnished for the building, done at the instance of the contractor at a shop away from the building, which material, and hence such work, did not go into the structure. In holding that the claimant had a right of lien under such circumstances, Chief Justice Start, speaking for the court, said:

“The necessary inference from the two decisions we have cited is that mechanics and materialmen furnishing labor or materials for the erection of a building, at the request of the contractor, are given by the statute not simply the right to be subrogated to the rights of the contractor, but an independent right to a lien on the building and land upon which it stands, which cannot be defeated by the misconduct or fraud of the

contractor. The owner when he enters into a contract with a builder for the erection of a house is deemed to contract with reference to the statute which becomes a part of the contract and in legal effect he thereby consents that his contractor may, subject to the conditions and limitations of the statute, pledge the credit of the building for the necessary labor and materials for its construction in accordance with the contract. *Laird v. Moonan*, 32 Minn. 358, 20 N. W. 354; *Bohn v. McCarthy*, 29 Minn. 23, 11 N. W. 127; *Bardwell v. Mann*, 46 Minn. 285, 48 N. W. 1120. It is true as a general rule that to entitle a mechanic or materialman to a lien for work performed or materials furnished at the request of the contractor, the work must be done, or the material delivered on the premises upon which the building is being erected. The case of *Howes v. Reliance Wire-Works Co.*, *supra* [46 Minn. 44, 48 N. W. 448], however, establishes an exception to this rule which is to the effect that where the material required for the erection of a building is specially prepared for it at the shop of the contractor with the consent of the owner, the material is deemed to have been furnished on the premises. The exception ought not to be extended to cases not fairly within the principle upon which it rests, otherwise the door will be opened for fraud or collusion between the contractor and the mechanic or materialman.

"The findings of the trial court in this case brings it clearly within the exception, for the work of the plaintiff was by the consent of the defendant, performed at the shop and it was there passed upon by the defendant, by his architect, as the work progressed. The defendant and the contractor adopted the shop as the place for doing the work which was necessary to be done in the erection of his house. The plaintiff's right to a lien then is exactly what it would have been if he had performed the labor in the preparation of the materials for the erection of the house on the premises on which it was being built, and the contractor had refused to permit the product of his work to be placed in the house. It follows that the

fact that the work was done at the shop and not on the premises does not affect the plaintiff's right to a lien."

While we concede that the authorities are not harmonious upon the question of the necessity of material actually going into and becoming a part of the structure in order to support a lien right, which is the particular question we are now considering, we think the decided weight of authority is in harmony with the early holding of this court in the *Denny Hotel* case, and the cases from other courts above quoted from. This view of the law finds support in the following authorities: *Trammell v. Mount*, 68 Tex. 210, 4 S. W. 377, 2 Am. St. 479; *Watts v. Whittington*, 48 Md. 353; *Nelson, Benton & O'Donnell v. Iowa East. R. Co.*, 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124; *Burns v. Sewell*, 48 Minn. 425, 51 N. W. 224; *Crane Co. v. United States Fidelity & Guaranty Co.*, 74 Wash. 91, 132 Pac. 872; Phillips, *Mechanics' Liens* (3d ed.), p. 260; 2 Jones, *Liens* (3d ed.), § 1329.

Now is appellant rendered liable upon its bond for the material furnished in good faith by respondent with the understanding that it was to be used in the construction of the plant, though not so used, as property privately owned would be under our lien statute? It is true the contractor and subcontractor are not, by express words in the statute, made the agents of the surety upon the bond for the contracting of such liability, as they are made the agents of the owner of private property by the language of our lien statutes; but we think, nevertheless, in the view of the law announced in the *Pennsylvania* and *Minnesota* cases, above quoted from, the contractor and subcontractor do become the representatives of the surety for the purpose of contracting such liability as against the surety. We have seen that the statutory condition of

the bond which was given in this case is that the contractor shall pay subcontractors and all persons who shall supply subcontractors "with provisions and supplies *for the carrying on of such work.*" The words "provisions and supplies," so used, we think, include materials such as the sheet metal furnished by respondent; and the words "for the carrying on of such work" refer to the furnishing to subcontractors of such material for that purpose in good faith, though it may not be actually used in the construction of the building or plant, by reason of some fault of the contractor or subcontractor, and without fault of the one so furnishing the material.

It is further contended in appellant's behalf that respondent's claim against appellant, as surety on the bond, must fail because the material so furnished by it was not delivered at or near the school building in which the plant was being installed. The decision of the Pennsylvania court in *Hinchman v. Graham*, above quoted from, is authority against this contention, as is also the decision of the Minnesota court in *Berger v. Turnblad*, above quoted from. This view of the law also finds support in *Trammell v. Mount, supra*, and *Evans Marble Co. v. International Trust Co.*, 101 Md. 210, 60 Atl. 667, 109 Am. St. 568. The following of our decisions, it is insisted, hold to the contrary, but we think they do not do so when critically read: *Knudson-Jacob Co. v. Brandt*, 44 Wash. 68, 87 Pac. 43, was the sale and delivery of the material to one who was engaged in constructing a number of houses, and was made under such circumstances, as it was there held, that it could not be determined what particular portion of the material was furnished for any particular house. This was the real reason that the lien claim could not be sustained. In *Little Bros. Mill Co. v.*

Baker, 57 Wash. 311, 106 Pac. 910, 135 Am. St. 980, the lien claim failed for the same reason. In *Gate City Lumber Co. v. Montesano*, 60 Wash. 586, 111 Pac. 799, there was involved a claim against the city of Montesano because of its failure to require of the contractor a bond in compliance with the statute, it being for lumber claimed to have been furnished for the carrying on of the work. The claimed delivery consisted only of the lumber company placing the lumber upon cars at a railroad station for shipment, some distance from the place where the work was being carried on. Thereafter a large part of the lumber was diverted and not used in the structure at all. This, it was held, was not such a delivery at or near the place where the lumber was to be used as to give the lumber company a right of action upon the bond. In that case there was no understanding and no necessity for the lumber being delivered at a shop or place where the contractor or subcontractor was specially preparing his material before being placed in the structure, as in this case.

We think none of these cases are controlling here. The question of whether a delivery of material to a contractor or subcontractor is such as to entitle the one so furnishing it to recover upon the bond if the work be public, or to a lien if the work be private, is not one which can be determined by a hard and fast rule applicable to all cases. It seems to us that, where material is delivered to a subcontractor in good faith for the carrying on of the work, as in this case, at a convenient shop of the subcontractor, where it is understood that the material is to be prepared for the structure, and the work of such preparation is there actually being done, such a delivery is sufficient to entitle the materialman so furnishing and delivering the

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material to recover upon the bond given for the security of the materialman. In other words, we think such a delivery is, in effect, the same as if made at the place where the material is to become a part of the structure.

We conclude that the judgment must be affirmed. It is so ordered.

MAIN, C. J., MOUNT, HOLCOMB, and FULLERTON, JJ.,
CONCUR.

ON REHEARING.

[*En Banc*. May 31, 1919.]

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein, and for the reasons there stated, the judgment is affirmed.

[No. 14805. Department Two. January 9, 1919.]

J. PERCIVAL JONES, *Respondent*, v. STEPHEN BERG,
Appellant.¹

VENDOR AND PURCHASER (125)—BONA FIDE PURCHASER—NOTICE—RECORDS—INDEX. An index of the record of a deed giving the description as parts of lots 5 and 6, is a sufficient compliance with Rem. Code, § 8787, to put a purchaser upon inquiry as to a building restriction in the deed against adjoining property in lot six, granting an easement in eight feet along the common boundary.

SAME (124)—NOTICE—RECORDS IN CHAIN OF TITLE. A deed conveying part of a lot and granting an easement in the remainder, is within the chain of title to the remainder, so as to import notice to subsequent purchasers of the remainder, even though executed by only one of two tenants in common.

EASEMENTS (10)—EXPRESS GRANTS—CONSTRUCTION. A deed covenanting that the grantor will not build upon adjoining property closer than eight feet to the south line of the property conveyed, so that there shall be sixteen feet between the buildings, grants an easement in the north eight feet of the adjoining land.

¹Reported in 177 Pac. 712.

TENANTS IN COMMON (1-1)—SEVERANCE—GRANTS BY ONE TENANT. A conveyance by one of two tenants in common of part of the common property is valid as a transfer of the grantor's interest, entitling the grantee to equities therein against the nongranting tenant in case of a partition.

SAME (1-1)—CONFIRMATION. Where one of two tenants in common conveys part of the common property, together with an easement in the remainder, pursuant to an oral agreement with his cotenant, a subsequent quitclaim deed by both cotenants of the remainder is a confirmation of the previous oral agreement and a recognition of the easement, avoiding the necessity of a formal partition between the cotenants.

VENDOR AND PURCHASER (126)—BONA FIDE PURCHASER—NOTICE BY RECORD. Where one of two cotenants conveyed part of the common property with building restrictions and subsequently both cotenants conveyed the remainder by quitclaim, their acts and acquiescence amounting to a partition, one claiming by warranty deed through the quitclaim grantee, with notice by record of the previous conveyance, takes with notice of, and is bound by, the building restrictions.

SAME (126). In such case, the fact that the quitclaim of the remainder may have been in satisfaction of the mortgage upon the remainder, prior in time to the conveyance, does not give the quitclaim grantee the right to question the validity of the building restrictions; since the mortgage title was not perfected.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 30, 1918, in favor of the plaintiff, in an action for an injunction, tried to the court. Affirmed.

Myers & Johnstone, for appellant.

Jay C. Allen, for respondent.

PARKER, J.—The plaintiff, Jones, commenced this action in the superior court for King county, seeking an injunction against the defendant, Berg, restraining him from constructing a dwelling-house upon his lot in Seattle within eight feet of the north line thereof, which is also the south line of Jones' lot. The claimed right to injunctive relief is rested upon a building restriction covenant contained in a deed executed by one

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Peterson to Jones while Peterson and one Christianson were the owners each of an undivided one-half interest in Berg's lot; and also upon the claimed authorization and ratification by Christianson of the making of the building restriction covenant by Peterson. Trial of the cause upon the merits in the superior court resulted in judgment granting to Jones the injunctive relief prayed for, from which Berg has appealed to this court.

The land with which we are here concerned lies in lots 5 and 6 of Kilbourne's supplemental plat of Lake Union addition to the city of Seattle. The side lines of these lots run east and west, while the end lines run north and south; they are of equal size, each being sixty feet wide. The south line of lot 5 is also the north line of lot 6. Jones owns the south twelve feet of lot 5 and the north 24 feet of lot 6, making his tract 36 feet wide, which we shall, for convenience, call the Jones lot. Berg owns, subject to the building restriction covenant as claimed by Jones, the south 36 feet of lot 6, which we shall, for convenience, call the Berg lot. This will serve to distinguish their respective tracts from the lots as numbered upon the Kilbourne official plat. On June 24, 1916, Peterson was the owner of the Jones lot. Peterson and Christianson were then the owners, each of an undivided one-half, of the Berg lot. On that day Peterson executed and delivered to Jones a warranty deed in compliance with their previous contract of sale, which deed, omitting signatures and acknowledgment, reads as follows:

"The grantor, James Peterson, for and in consideration of ten (\$10) dollars in hand paid, conveys and warrants to J. Percival Jones, the grantee, the following described real estate:

"The south twelve (12) feet of lot five (5) and the north twenty-four (24) feet of lot six (6), both in block

fifty-six (56) of Kilbourne's Supplemental Plat of that part of Lake Union Addition to the city of Seattle, situated in lot four (4), section seventeen (17), tp. twenty-five (25) N. R. 4 E. Subject only to the lien of two mortgages, one for fourteen hundred dollars, the other for seven hundred and fifty dollars, both due August 1st, 1918. The interest on both to be paid to date by grantor.

"The party of the first part covenants that neither he, his heirs or assigns will build any building upon the lot or property adjoining the above property on the south which shall be closer than eight feet to the south line of the property hereby conveyed, so that there shall be sixteen feet between any building which may be built on the property to the south and the building on the property hereby conveyed, and covenants that this covenant shall be a covenant running with the land and binding on any and all grantees as well as the heirs and assigns of the grantor herein. The property hereby conveyed is situated in the county of King, state of Washington."

This deed was filed for record in the office of the auditor of King county on June 27, 1916, and indexed as follows:

"Date of reception, June 27th, 1916; grantor is James Peterson; grantee, J. Percival Jones; volume 946 of Deed, page 387; part of Lots 5 and 6, Block 56, Kilbourne's Supplemental Lake Union."

On April 7, 1917, Peterson and Christianson executed and delivered to a Mrs. Brace a quitclaim deed for the Berg lot. This quitclaim deed was given in satisfaction of a mortgage held by Mrs. Brace against the Berg lot, executed before the execution of the deed from Peterson to Jones. This quitclaim deed did not, however, upon its face indicate that such was its purpose. It was duly filed for record in the office of the auditor of King county on April 13, 1917. On May 31, 1917, Mrs. Brace and her husband executed and deliv-

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ered to Berg a warranty deed for the Berg lot. It was duly filed for record in the office of the auditor of King county on June 26, 1917. This deed contained no building restriction covenant. Other facts will be noticed touching the question of authorization and ratification by Christianson of the making of the building restriction covenant by Peterson in his deed to Jones, when we come to the consideration of the question of Christianson, Mrs. Brace, and Berg being bound by such authorization and ratification.

It is first contended in behalf of appellant Berg that he is, in no event, bound by the building restriction covenant contained in the deed from Peterson to Jones, since he had no actual or constructive notice thereof. It may be conceded that he had no notice of that covenant other than such as would be imparted to him by the recording and indexing of the deed in which it was contained. It is conceded that the deed was duly recorded in the office of the auditor of King county soon after its execution, but it is argued that such recording imparted no notice to Berg as a subsequent purchaser of the Berg lot, because it was not properly indexed. Our recording statutes prescribe the manner of keeping indices as follows:

“Every auditor must keep a general index, direct and inverted. The direct index shall be divided into seven columns, and with heads to the respective columns, as follows: Time of reception, grantor, grantee, nature of instrument, volume and page where recorded, remarks, description of property. He shall correctly enter in such index every instrument concerning or affecting real estate which by law is required to be recorded, the names of grantors being in alphabetical order. The inverted index shall also be divided into seven columns, precisely similar, except that ‘grantee’ shall occupy the second column and ‘grantor’ the third, the name of grantees being (in

alphabetical order. For the purpose of this act, the term 'grantor' shall be construed to mean any person conveying or encumbering the title to any property," Rem. Code, § 8787.

It is argued that the property is not properly described in the index so as to impart notice, especially as to the portion of the Berg lot to which the building restriction covenant applies. We have seen that the index refers to the property as "part of lots 5 and 6, Block 56, Kilbourne's Supplemental Lake Union." This description, it may be conceded, is not such a description of property as would be required in a deed to real property; but that it points to the record of the deed wherein Peterson assumes to convey and encumber land within the boundaries of lots 5 and 6, and also plainly points to the book and page of the recording of the whole of the deed in which the conveyed and incumbered property is described with certainty, we think is quite plain. Counsel for Berg invoke the general rule that the indexing of a recorded instrument, when required by statute, is as necessary to the imparting of notice to subsequent purchasers as is the recording of the instrument by copying it in full in the proper record book, citing *Ritchie v. Griffiths*, 1 Wash. 429, 25 Pac. 431, 22 Am. St. 155, 12 L. R. A. 384, so holding, wherein the subject is exhaustively reviewed, but in which case there was involved a recorded deed which was not indexed in any manner. In *Malbon v. Grow*, 15 Wash. 301, 46 Pac. 330, there was involved the indexing of a recorded mortgage. The description column of the index was ruled into four columns, the first headed, "Description;" the second headed, "Sec. Lot;" the third headed, "Twp. Block;" the fourth headed, "R". In the column headed "Description," was inserted the word "Land"; in the column headed "Sec. Lot", was inserted the number

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“35”; in the column headed “Twp. Block”, there was inserted the number “7”; in the column headed “R”, there was inserted the number “36”. Disposing of the contention that this indexing of the recorded mortgage was insufficient to put a subsequent purchaser of the property upon notice of its contents, Judge Dunbar, speaking for the court, said:

“It is true that this description is not technically correct. There is really nothing to indicate whether the figures ‘35’ refer to section or lot, or whether the figure ‘7’ refers to township or block; it might refer to either. But if one desired to purchase lot 35 in block 7, he would find the description of that lot and block in this index; or if he desired to purchase section 35 in township 7, he would also find the description in this index sufficient to cause a reasonable man to examine the record and ascertain whether the figures in the index referred to a lot or a section, a township or block we think that the index in this case furnished information, or at least a suggestion, of the fact of the record of the mortgage, which the appellant could not ignore without the grossest kind of negligence. If it should be construed to be township and section, then the index of the sale of the whole section 35, in township 7, must be construed to give notice of the same or any portion of such section or township, under the rule that the greater includes the less here we have not only the names of the grantor and the grantee and the book in which the instrument is recorded, but we also have a description, though imperfect, of the land itself, sufficient to challenge the attention of the searcher of the record, and one who purchases after such challenge is not an innocent incumbrancer or purchaser without notice.”

This view of the law finds ample support in the authorities. See 39 Cyc. 1739-1740, and authorities there cited. In the text of Cyc. it is there said:

“When an imperfect or inaccurate index is of such a character as should lead a prudent person to ex-

amine the record, he is affected with notice of what the record would have imparted."

It is also contended, touching this branch of the case, that the recording of the deed from Peterson to Jones, conveying the Jones lot and containing the building restriction covenant incumbering the Berg lot, was not notice to subsequent purchasers of the Berg lot, because that deed was not within the chain of title to the Berg lot. Counsel invoke the general rule recognized in *Attebery v. O'Neil*, 42 Wash. 487, 85 Pac. 270, and *Burr v. Dyer*, 60 Wash. 603, 111 Pac. 866, that recorded instruments which are outside the chain of title are not required to be noticed by purchasers. The trouble with this argument, as it seems to us, is that the deed from Peterson to Jones, in so far as it purports to incumber the Berg lot with the building restriction covenant, is not outside the chain of title to that lot. That deed purports to convey an easement interest to Jones in the Berg lot by Peterson, who then had an interest therein evidenced by prior instruments which are within the chain of title to that lot. The mere fact that the interest so conveyed may be less than the whole fee title to the portion of the Berg lot so incumbered, and may be only a portion of the interest of one co-owner, does not argue that the deed in which such covenant is found is outside the chain of title to that lot. In the *Attebery* case the mortgage in question was held to be outside the chain of title, in so far as it purported to mortgage the interest of one of the persons who executed the mortgage, because there was nothing in the chain of title showing that such person had any interest in the property. In the *Burr* case, the rule was recognized in general terms, yet that decision also lends support to the view of the law we here express. We think it

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safe to say, speaking in general terms, that any instrument purporting to incumber or convey an interest in a sufficiently described tract of land, executed by a person having an interest therein as disclosed by other prior instruments within the chain of title, is within the chain of title. In this case, it is plain that Peterson with Christianson held title to the whole of the Berg lot, evidenced by prior conveyances within the chain of title to that lot.

It is further contended, touching this branch of the case, that a prospective purchaser of the Berg lot was not bound to look beyond the description of the Jones lot found in the deed from Peterson to Jones. We cannot adopt this view. The language of the deed as plainly and certainly describes the portion of the Berg lot purported to be incumbered by the building restriction covenant therein as it does the Jones lot which it purports to convey in fee; and since the portion of the Berg lot which that deed purports to incumber, to wit, the north eight feet, lies within lot 6, plainly the indices point to that portion of Berg's lot, as well as to that portion of lots 5 and 6 occupied by the Jones lot. The building restriction covenant in the deed from Peterson to Jones, in effect purported to grant to Jones an easement interest in the north eight feet of the Berg lot, as plainly as that deed purports to convey the Jones lot in fee. In 9 R. C. L. 735, the learned editors observe:

“An easement has been defined as a liberty, privilege or advantage in land without profit, existing distinct from the ownership of the soil. It is a right which one person has to use the land of another for a specific purpose. As more fully defined it is a privilege without profit, which the owner of one tenement has a right to enjoy in respect to that tenement, in or over the tenement of another person, by reason where-

of the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former, a charge or burden upon one estate (the servient) for the benefit of another (the dominant).''

Plainly the language of the building restriction covenant grants to Jones, as the owner of the Jones lot, a "privilege or advantage" in the north eight feet of the Berg lot, and makes that privilege a covenant running with the land, and this we understand to mean all the land so conveyed and incumbered. We are of the opinion that the recording of the deed from Peterson to Jones and the indexing thereof, as above noticed, was as effective notice of the building restriction covenant purporting to incumber the Berg lot as it was notice of the conveyance of the Jones lot.

How effectual the building restriction covenant in the deed from Peterson to Jones purporting to incumber the Berg lot became, as against Christianson, Mrs. Brace, and Berg, we now proceed to inquire. Peterson testified that, before he gave to Jones the deed containing the building restriction covenant, he and Christianson had agreed orally between themselves that no building should be constructed upon either his lot, now the Jones lot, or the lot to the south, which they owned together, now the Berg lot, within eight feet of the line between the two lots, so that there would be at least sixteen feet of an open space between the buildings to be constructed upon the respective lots. That there was then such an agreement and understanding between Peterson and Christianson, and that such agreement was thereafter fully confirmed and acted upon by both, we think is abundantly shown by the evidence. We have seen that the language of the building restriction covenant not only grants an easement right in the Berg lot, but it implies that a like easement right is reserved in the

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Jones lot for the benefit of the owners of the Berg lot. This is a circumstance of at least some weight, especially as touching the question of notice to subsequent purchasers of the Berg lot. On June 14, 1916, which, it will be noticed, was ten days before the execution of the deed from Peterson to Jones containing the building restriction covenant, Peterson and Christianson, contemplating a sale of the Berg lot to one Anderson, signed and acknowledged a warranty deed purporting to convey the Berg lot, but at Anderson's instance left the space in the deed for the grantee's name blank. That deed contained in its warranty clause the following: "That the same (premises) are free from all liens and incumbrances except one mortgage of seven hundred fifty, also no building to be built within 8 ft. of the north line." This was written into the deed by express consent and with the positive knowledge of Christianson. That contemplated sale was not consummated, and, by consent of all parties, the signatures to the deed were torn off. The body of the deed, however, was not destroyed and is in evidence in this case, not as evidence of a conveyance of the title, but as tending to show that Peterson and Christianson had an understanding and agreement as to the building restriction, such as testified to by Peterson, and thereafter embodied in the building restriction covenant in his deed to Jones.

Soon after the execution of the deed from Peterson to Jones, Peterson informed Christianson of the execution of that deed and the building restriction covenant embodied therein, incumbering the lot owned by them in common, now the Berg lot. Christianson never made any objection thereto. It is also worthy of note that Christianson knew, at the time of the signing of the Anderson deed, that Peterson had theretofore made a contract for the sale of the Jones

lot to Jones, with the same building restriction covenant therein, purporting to incumber the Berg lot, as was thereafter embodied in the deed from Peterson to Jones, executed in pursuance of that contract, which contract we also note was duly recorded and indexed, as was the deed executed in pursuance thereof. We have seen that, some ten months after the execution of the deed from Peterson to Jones containing the building restriction covenant, Peterson and Christianson, on April 7, 1917, executed and delivered to Mrs. Brace a quitclaim deed for the Berg lot. While that deed seems to have been given in satisfaction of the \$750 mortgage, it does not so show upon its face. We may say that the record strongly suggests to our minds that that deed was made in quitclaim form also because of the building restriction covenant in the deed from Peterson to Jones purporting to incumber the Berg lot. It also seems to us that such reason for its being in that form would also be suggested by its record to all subsequent purchasers of the Berg lot. Thereafter, on March 31, 1917, as we have seen, Mrs. Brace and her husband conveyed by warranty deed to Berg the Berg lot.

Invoking the general rule recognized in *Rowe v. James*, 71 Wash. 267, 128 Pac. 539, that one of two cotenants cannot, by any unauthorized acts, estop the other so as to impair the other's interest or title in the common property, counsel for appellant Berg contend that the building restriction covenant in the deed from Peterson to Jones was wholly ineffectual to incumber the Berg lot, either upon the theory of prior authorization or subsequent ratification on the part of Christianson. There was a time when the authorities seemed to support the view that a conveyance by one cotenant alone of any portion of land or

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interest therein, held by him in common with another, especially if the cotenancy was a joint tenancy, as at common law, was wholly void and ineffectual to transfer even the interest of such cotenant. We think it plain, however, that such is not the law according to present-day authority. In Freeman, Cotenancy and Partition (2d ed.) § 204, it is said:

“We are not sure that the difference in the decisions of many of the courts upon this subject has not been more in form of expression than in matters of substance. If, however, there remain any states wherein the courts really intend to assert that a conveyance by one cotenant of part of the common property is void, in any other sense than that such conveyance will not operate to diminish or impair the rights of the non-assenting cotenants, such courts are falling into the minority, as the more recent decisions tend strongly and surely toward the recognition of such conveyance as a valid transfer of all the grantor’s interest in the property therein described, entitling the grantor to certain rights that the cotenants of the grantor cannot wantonly disregard.”

This was said by the learned author in 1886, and we think that the decisions of the courts rendered since then fully justifies his statement then made. We do not understand that counsel for Berg make any serious contention against this view of the law. We proceed, therefore, having in mind that the building restriction covenant made by Peterson in his deed to Jones purporting to incumber the Berg lot, the common property of him and Christianson, may have been authorized or ratified by Christianson so as to make it fully effectual as against both.

In *Eaton v. Tallmadge*, 24 Wis. 217, 223, Justice Paine, speaking for the court, said:

“Where there are two tenants in common, each owning an undivided half of land, neither can make a par-

tition that will be binding upon the other, by assuming to convey either half specifically. But if one does so convey, we think the other would be at liberty to acquiesce, and to accept the remaining half. And if he should do so, by conveying that specifically, the two conveyances would operate as a complete and binding partition."

This, it seems to us, is the principle upon which this case must be decided. It is true that this is not a case where one of the cotenants has assumed to convey the entire title to a specific one-half of the entire property, his cotenant conveying the other half; but it is a case where one cotenant, to wit, Peterson, has conveyed an easement interest in a specific portion of the common property, which easement affects less than one-half of it, and where the two cotenants joining in one conveyance have, by quitclaim deed, conveyed all their remaining interest in the whole of the common property. This, it seems to us, in the light of the facts shown by this record, was a confirmation on the part of Christianson of his previous oral agreement with Peterson, and of the act of Peterson in assuming to grant an easement incumbering the Berg lot by the building restriction covenant in his deed to Jones. This quitclaim deed avoided all necessity of formal partition of the Berg lot between them, and was as much a recognition by Christianson of Peterson's power to so incumber the Berg lot as if he had conveyed absolutely the north half of the Berg lot and Christianson had conveyed the south half.

In *Cook v. International & G. N. R. Co.*, 3 Tex. Civ. App. 125, 22 S. W. 1012, it was said:

"While it has been held that the deed of a tenant in common for a portion of the land by metes and bounds is void, the recognized doctrine in this state is that such a deed will convey an equity which the

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grantee has a right to assert in a suit for partition, and to have the land conveyed and set apart to him in the partition, if it can be done without prejudice to the other tenants in common. Plaintiffs in this case, after the sale by their cotenants to the defendant, proceeded to partition the remainder of the land among themselves. The partition was exclusive of the land conveyed to the defendant, and they did not make it a party to such partition, but in fact cut themselves off from the power to have any other partition with the defendant, such as would recognize its right to have the land in controversy set apart to it. Such proceedings were equivalent to a recognition of the right of the defendant to have the land set apart to it, because all of the rest of the land was appropriated by plaintiffs, and the defendant could not have a proportional part of the land set apart to it elsewhere in the tract if it should appear inequitable for it to retain the identical tract conveyed to it by plaintiffs' cotenants. Rev. St. art. 3490; *March v. Huyter*, 50 Tex. 251; *Peak v. Swindle*, 68 Tex. 252, 4 S. W. Rep. 478; Freem. Coten. §§ 199-204. When the equitable right of the vendee of a cotenant to have the land conveyed to him by metes and bounds set apart to him, if it can be done without prejudice to the interests of the other cotenants, is once recognized, there can be no reason why the same principle should not apply to a less interest than the entire interest of the cotenant."

This was said in a case where there was involved a conveyance by one cotenant of less than his entire interest in the common property.

In *Currens v. Lauderdale*, 118 Tenn. 496, 101 S. W. 431, there is quoted with approval from 17 Am. & Eng. Ency. Law (2d ed.), p. 684, the following:

"While it is well settled that one tenant in common cannot convey a specific part of the common property by metes and bounds to the prejudice of his cotenant, it does not necessarily follow that all such conveyances are wholly void. The true doctrine, as deduced

from actual decisions, seems to be that such conveyances are absolutely void as against cotenants whose rights are prejudiced thereby and who have not consented to them or ratified them, but that, when confirmed or assented to by the other cotenants, such conveyances are valid as against all parties. The assent of the cotenant in such cases need not necessarily be by deed, but may be inferred from long acquiescence in the grantee's title. In any case it seems that a tenant cannot complain of a conveyance of a specific part of the common estate by a cotenant, where his own rights are not injuriously affected thereby; and a court of equity will respect the rights of the tenants, so far as this can be done consistently with the rights of the other cotenants, and, wherever practicable, will confirm the title of the grantee by allotting to the grantor that portion of the land conveyed."

In *Pellow v. Arctic Iron Co.*, 164 Mich. 87, 128 N. W. 918, Ann. Cas. 1912B 827, 47 L. R. A. (N. S.) 573, Justice Brooke, speaking for the court, upon a situation involving the ratification by one cotenant of the deed of another, purporting to convey a part of the common property, observed:

"We have seen that the non-granting cotenant may not disregard the deed of his granting cotenant and treat it as a nullity. While such deed cannot be permitted to operate to his prejudice, nevertheless it imposes upon him an obligation to do no act which would impair the equities created by his cotenant by the execution of the deed. If dissatisfied with the act of his cotenant, he can at once commence proceedings in partition, making the individual grantees of his cotenant parties thereto. In such proceeding, his rights will be fully protected and the rights of the individual grantees will not suffer, if they can be preserved without injury to the interest of the non-granting cotenant. This right of the nongranting cotenant is clear, while the right of the grantee of a specific parcel to demand partition of the entire estate is, at least, doubtful The non-granting cotenant may, of course,

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give formal assent to the unwarranted act of his granting cotenant, in which event the individual grantees take exactly what the deed purports to convey. Or he may, by a course of dealing with the balance of the common estate, in which he totally disregards the equitable rights created by his cotenant's deed, be held to have so acted in recognition and ratification thereof. This ratification, if clearly made out, would and ought to have the same effect as a formal assent."

See, also, 7 R. C. L. 883; *Worthington v. Staunton*, 16 W. Va. 208; *Burr v. Dyer*, 60 Wash. 603, 111 Pac. 866.

It is true that this is not a partition suit, but the principle which would induce a court in a partition suit to award to Peterson's grantee, Jones, the easement right in the north eight feet of the Berg lot is, we think, all sufficient to protect such easement right in Jones upon the theory of Christianson's authorization and confirmation of such grant by Peterson.

Is Berg, who received his title from Mrs. Brace by warranty deed from her purporting to convey the whole of the Berg lot free from incumbrance, bound by the building restriction covenant in the deed from Peterson to Jones purporting to incumber that lot? We think he is. He had record notice of that building restriction covenant purporting to incumber the Berg lot, in the contract wherein Peterson agreed to sell the Jones lot to Jones, and also in the deed executed and delivered by Peterson to Jones pursuant to that contract. He had record notice of the fact that Jones was one of two cotenants owning the Berg lot. He had record notice of the conveyance, by quitclaim deed only, of all of the remaining interest of Peterson and Christianson in the Berg lot to Mrs. Brace, suggestive of the refraining of Christianson, as well as Peterson, warranting the title to the Berg lot because of the

building restriction covenant in the deed from Peterson to Jones purporting to incumber that lot, as well as because of the \$750 mortgage on that lot. The law, as settled by present day authority, told him that the building restriction covenant was not void, and that it could or might be rendered effective against Christianson, as it already was against Peterson, by acts on their part amounting to, or taking the place of, partition of the Berg lot between them, or even by a decree of court in a partition suit.

Some contention is made that, since the quitclaim deed from Peterson and Christianson to Mrs. Brace was given in satisfaction of the \$750 mortgage held by her, which mortgage lien was superior to the easement right created by the building restriction covenant, equitable considerations now dictate that the quitclaim deed should also be considered as vesting in her a title freed from the incumbrance created by the building restriction covenant. The trouble with this argument, as we view it, is that the mortgage did not give Mrs. Brace any title whatever in the Berg lot, but was a mere lien thereon to secure the \$750 mortgage debt owing to her. If she chose to take a quitclaim deed from the owners thereof, conveying to her all their remaining interest in the Berg lot in payment of the debt secured by her mortgage, it seems plain to us that she got no better title than they then possessed, which, as we have seen, was subject to the easement right created by the building restriction covenant. The fact that she might have foreclosed her mortgage, and upon sale thereunder of the Berg lot the purchaser would have gotten title thereto freed from the incumbrance of the building restriction covenant, assuming that it would have been necessary to sell all of the lot, including the north eight feet thereof, in

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order to raise sufficient funds to pay the mortgage debt, we think does not argue at all that she acquired any greater interest in the Berg lot by the quitclaim deed than was then possessed by Peterson and Christianson. The fact remains that she did not seek to foreclose her mortgage to the end that perfect title might be vested in her, or someone else who might become the purchaser thereof at a foreclosure sale, but she merely elected to take such title as they possessed in satisfaction of the mortgage debt.

We may here observe that the wives of both Jones and Berg were joined with each of them, respectively, as parties to this action. We have spoken of Jones and Berg as though they were the only parties to the action, merely for convenience of expression. Of course, all we have said applies to their wives as well as to them. We conclude that respondent Jones and wife are entitled to injunctive relief securing to them enjoyment of the easement right granted by the terms of the building restriction covenant in the deed from Peterson, as awarded by the trial court.

The judgment is therefore affirmed.

HOLCOMB, MOUNT, and FULLERTON, JJ., concur.

[No. 14885. Department Two. January 9, 1919.]

FAWKNER, CURRIE & COMPANY, INCORPORATED,
Appellant, v. SANITARY FISH COMPANY
et al., Respondents.¹

ATTACHMENT (33)—DISSOLUTION—GROUNDS—MOTION. A motion to discharge an attachment on the ground that it was "improperly or irregularly issued," as authorized by Rem. Code, § 674, is sufficient where it was supported by affidavits traversing the plaintiff's allegations of attachment.

SAME (39-1)—DISSOLUTION—EFFECT OF AFFIDAVITS. It is not error to discharge an attachment where the affidavit therefor traversed every material allegation of the plaintiff tending to support the attachment, without equivocation or evasion.

Appeal from an order of the superior court for Skagit county, Brawley, J., entered March 29, 1918, upon findings in favor of the defendants, dissolving an attachment, after a hearing before the court. Affirmed.

Dudley G. Wooten, for appellant.

HOLCOMB, J.—Appellant seeks a reversal of a final order of the court below, dissolving and discharging a writ and levy of attachment upon 1,865 cases of salmon fish seized as belonging to the respondents. The original affidavit for attachment was based upon the ground that "defendants, acting in unlawful collusion, are about to assign, secrete, and dispose of their property with intent to delay and defraud their creditors, including plaintiff." On March 16, 1918, respondents served and filed a motion to discharge the attachment, supported by affidavits, upon the statutory ground (Rem. Code, § 673), "that the writ of attachment was improperly or irregularly issued." This

¹Reported in 177 Pac. 708.

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motion came on to be heard March 21, 1918, at which time, upon a showing by appellant, the hearing was postponed to March 28, 1918, and an order issued directing the sheriff to release from the levy all of the property in excess of the value of \$1,200, appellant's cause of action being for the sum of approximately \$600. On March 27, 1918, appellant served an amended complaint, and on March 28, filed an amended and supplemental affidavit for attachment before the hearing on that day of the motion to discharge, which amended and supplemental affidavit for attachment made the following additional allegations:

"That, prior to March 1, 1918, defendants had assigned, secreted and disposed of a part of their property with intent to delay and defraud their creditors; and prior to March 1, 1918, defendants had converted a part of their property into money for the purpose of placing it beyond the reach of their creditors and to delay and defraud their creditors; and that prior to March 1, 1918, and since that date, defendants were about to convert a part of their property into money for the purpose of placing the same beyond the reach of their creditors and to delay and defraud their creditors."

Voluminous counter affidavits were filed by respondents in support of their motion to discharge the attachment, traversing at length and in detail the allegations of the amended complaint and the affidavit for attachment of appellant tending to show collusion for the purpose of delaying and defrauding their creditors, and denying that they had disposed of any part of their property with intent to delay and defraud creditors, or converted the same into money for the purpose of placing it beyond the reach of and to delay and defraud creditors, or that they were about to convert a part of their property into money for such purpose. Voluminous affidavits were also filed by appel-

lant, attempting to establish the transactions referred to therein as fraudulent and collusive and committed with the intent of defrauding the creditors. Upon the reading of the affidavits on the hearing, the court made findings of fact and conclusions of law in favor of respondents, and discharged the writ and levy of attachment.

Appellant objected to the original motion to discharge the attachment, upon the ground that the same presents no issue to be tried, since it did not state facts sufficient to entitle defendants to any relief, or to raise any issue of law or fact, which objection was by the court overruled and plaintiff excepted. Thereupon defendants moved for leave to amend and amplify their motion to discharge the attachment, which was granted by the court, and to which plaintiff excepted, and the motion to discharge was thereupon amended by adding the words "and the said writ of attachment was improperly issued and was issued upon an affidavit which is untrue, and no fact ever existed, or now exists, which entitled, or now entitles, the plaintiff to the writ of attachment herein." This motion was supported by several affidavits on the part of respondents. The court thereupon proceeded to the hearing, and both parties read their affidavits in evidence.

We are unaided by any brief or argument on behalf of respondents.

It seems to be contended by appellant that the motion to discharge the attachment in itself should contain all the elements of a traversing pleading. This is not correct. The statute heretofore cited provides that the motion to discharge the attachment shall be upon the ground that the same was improperly or irregularly issued. When the motion is based upon

affidavits only, it is unnecessary for the motion itself to be more precise than the statutory language, but the affidavits must specifically and precisely show that there existed no grounds for attachment as alleged. It is further provided (Rem. Code, § 674) that:

“If the motion be made upon affidavits upon the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to those on which the attachment was issued.”

That provision was followed by the defendants in this case, providing for supporting the motion by affidavits, which authorized plaintiff to oppose the same by affidavits or other evidence in addition to those on which the attachment was issued. This procedure was followed, and the objection of appellant was untenable. This practice was approved by this court in the cases of *Hansen v. Doherty*, 1 Wash. 461, 25 Pac. 297; and *Windt v. Banniza*, 2 Wash. 147, 26 Pac. 189.

The original motion to discharge the attachment, being supported by affidavits traversing the affidavits of appellant, was sufficient under our statute. There was, therefore, no error; and, indeed, there was no necessity to permit respondents to amend and amplify the motion to discharge the attachment, as was done.

It is vigorously contended by appellant that the proofs by respondents by affidavits were insufficient, in fact and in law, to justify the findings and conclusions supporting the order to discharge the attachment. A careful examination of the record discloses that the respondents traversed every material allegation on the part of the appellants tending to support the attachment, without equivocation or evasion. It was also shown by corroborating affidavits by other

affiants concerned in the transactions that the fish levied upon under the writ of attachment had never been the property of the Sanitary Fish Company, but was the property of a concern called Syme, Eagle & Company, which had contracted with defendant Carroll personally to re-can and re-condition the fish on account of its having been damaged and rendered unmarketable prior to December 14, 1917, when it was purchased by that company, and that the only interest defendant Carroll had in the salmon arose out of his contract to re-can and re-condition it for Syme, Eagle & Company, and that no part of the fish seized had ever been the property of either of the defendants.

It was held in *Watson v. Shelton*, 56 Wash. 426, 105 Pac. 850, that it was not error to discharge an attachment issued on the ground that the defendant was about to convert property into money for the purpose of placing it beyond the reach of his creditors, where the affidavit of attachment was controverted by affidavit showing that no attempt had been made to sell property and that the debtor desired his creditors to receive the full amount to which they were entitled. It is there held that, there being a direct and explicit controversion of the ground of attachment set forth in the original affidavit, no error was committed in discharging the writ of attachment. The same principle applies here.

No error was committed by the trial court upon the showing made before him discharging and dissolving the writ of attachment. The order is therefore affirmed.

MAIN, C. J., MOUNT, PARKER, and FULLERTON, JJ.,
concur.

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Statement of Case.

[No. 14897. Department Two. January 9, 1919.]

THE STATE OF WASHINGTON, *on the Relation of*
F. J. Cummings, Plaintiff, v. CHARLES A. JOHNSON,
Prosecuting Attorney of Okanogan County,
*Defendant.*¹

MANDAMUS (33-36)—TO OFFICERS—CONTROLLING DISCRETION. A plain case is required before the prosecuting attorney will be required to file an information in quo warranto to test the validity of the incorporation of a town.

MUNICIPAL CORPORATIONS (8)—INCORPORATION—DETERMINATION OF INHABITANTS—CONCLUSIVENESS. Under Rem. Code, § 7435, giving the county commissioners the power to ascertain and determine the number of inhabitants within the boundaries of a proposed town, their decision is conclusive, unless reviewed under the appeal statute, *Id.*, § 3909.

SAME (4)—TERRITORY INCLUDED—UNPLATTED LANDS. Under Rem. Code, § 7481, providing that no more than 20 acres of unplatted land belonging to one person may be included within the corporate limits of a town of the fourth class, the inclusion of 20 acres and the exclusion of 22.15 acres of one owner is proper.

SAME (4). Although platted for agricultural or garden purposes, lands may be included within the corporate limits of a town as platted land, where they were surveyed and subdivided into small tracts, designated by lot numbers, with streets named.

TAXATION (6)—UNIFORMITY—EXCLUSION FROM INCORPORATED TOWN. The exclusion from the corporate limits of a town of a portion of the owner's agricultural lands is not a violation of the constitutional provision of uniformity of taxation; since the same cannot be taxed for municipal purposes.

MUNICIPAL CORPORATIONS (8)—INCORPORATION—VALIDITY. Where the county commissioners had jurisdiction of the incorporation of a town, and did not act in excess thereof, the questions decided by them are reviewable only on appeal.

Appeal from a judgment of the superior court for Okanogan county, Grimshaw, J., entered January 29, 1918, in favor of the defendants, in an action to com-

¹Reported in 177 Pac. 699.

pel the prosecuting attorney to institute *quo warranto* proceedings, tried to the court. Affirmed.

J. M. Adams and *P. D. Smith*, for plaintiff.

Chas. A. Johnson and *W. H. Patterson*, for defendant.

HOLCOMB, J.—The petitioner sought a writ of mandamus to require the prosecuting attorney to bring an action in the nature of *quo warranto* to test the validity of the incorporation of the town of Riverside, Okanogan county, Washington, and to determine whether the land of petitioner and others has been legally included therein.

The facts of this case are practically set forth in the case of *State ex rel. Cummings v. Blackwell*, 91 Wash. 81, 157 Pac. 223, to which we refer, and which was a former appeal and dismissal because it was not from an appealable final order. The title of the appeal here is incorrect and should be, and is hereby ordered to be, "The State of Washington, on the Relation of F. J. Cummings, Plaintiff, v. Charles A. Johnson, Prosecuting Attorney of Okanogan County, Defendant."

Since the former appeal the superior court has tried the material issues, and all points involved were finally decided against petitioner. The petitioner assigns that the court erred, (1) in refusing to make an order requiring the prosecuting attorney to file an information in the nature of *quo warranto* against the pretended town of Riverside for insufficient population; (2) in holding that the lands owned by petitioner and others, described in their protest, were legally included in the town of Riverside; (3) in holding that noncontiguous territory can be legally included in a municipal corporation of the fourth class; (4) in hold-

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ing that lot 2, containing 22.15 acres, can be legally excluded from the incorporation of Riverside, although it is included within the exterior boundaries of the town; (5) in holding that the lands in Glenwood Acre Tracts and First Addition to Glenwood Acre Tracts are platted lands in contemplation of the law for organization of municipal corporations of the fourth class; (6) in holding that the county commissioners in incorporating the town excluded all unplatted land in excess of the allowable 20 acres; (7) in holding that the law does not provide for contiguity as a prerequisite of original incorporation, and (8) in holding that the showing made by petitioner is not a plain case nor *prima facie* case such as to require the prosecuting attorney to proceed as requested.

It is within the power of the superior court to direct the prosecuting attorney to file an information in the nature of *quo warranto* when the facts are sufficient to warrant it under Rem. Code, § 1035. If the incorporation proceedings are legal it would be idle to direct the prosecuting attorney to proceed by information. We said in *State ex rel. Cummings v. Blackwell*, 91 Wash. 81, 157 Pac. 223:

“Before the prosecuting attorney should be required to file an information in *quo warranto*, a plain case should be made by the petitioner, so that there could be no doubt that the prosecuting attorney would be justified in maintaining the *quo warranto* proceeding.”

Rem. Code, § 7435, gives the county commissioners power to ascertain and determine how many inhabitants reside within the boundaries of the town. The commissioners found that the population within the boundaries of the town was more than 300. This is the requisite number prescribed by statute, and is con-

clusive unless the statute makes such finding reviewable by the courts. We find no such statute, except the appeal statute, Rem. Code, § 3909, which was not resorted to by the petitioner.

The contention that noncontiguous areas were included within the corporate limits would be sound if the tract of land across the river just opposite to appellant's excluded land and the Glenwood Acre Tracts and the river itself had been excluded by the county commissioners in incorporating the town. Furthermore, the statute is not specific as to whether the commissioners must include only contiguous territory in the incorporation order, further than that the empowering statute, Rem. Code, § 7434, authorizes "any portion of a county"—using the singular of the noun "portion"—to be incorporated. In this case no more than one portion is incorporated. Section 7435, Rem. Code, in substance material here, provides the steps to be taken for incorporation. A petition must be signed by at least sixty qualified electors, residents within the limits of the proposed corporation, containing a particular description of its proposed boundaries, stating the number of its inhabitants, and a prayer for incorporation. Provision is made for a hearing by the board of county commissioners, who, on the final hearing, shall make such changes in the proposed boundaries as they find proper, provided that any changes made by the board shall not include any territory outside the boundaries described in the petition. Section 7481, Rem. Code, limits the area to be included in fourth-class corporations to one square mile, and provides that no more than 20 acres of unplatted land belonging to any one person within the corporate limits shall be taken without the consent of the owner of such unplatted land. Manifestly we can-

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not find that the board of county commissioners went beyond their power when they included appellant's 20 acres of unplatted land and excluded his 22.15 acres therefrom.

The contention that the Glenwood acre tracts are unplatted lands cannot be sustained. These tracts were surveyed, subdivided into small tracts and designated by lot numbers, and the testimony shows that streets are named. The petitioner's testimony shows that he platted these tracts for agricultural or garden purposes; but this can make no difference here, for the county commissioners found they were platted land. The size of the lots, blocks or tracts, and whether platted as lots, blocks, or tracts, is immaterial. No statute specifies any precise nomenclature or areas. In so far as we are advised, there is no statute in this state authorizing the platting of property, other than the statute governing the platting of town-sites or additions to towns.

The contention that the exclusion of petitioner's 22.15 acres is a violation of the constitutional provision as to uniformity of taxes is unsound, for this land cannot be taxed for municipal purposes when not made a part of the town, nor can that question be collaterally raised here.

The board of county commissioners had jurisdiction of the subject-matter of incorporating the town, and it does not appear that they acted in excess of their jurisdiction, and unless it plainly so appears, the questions decided by them are not made reviewable by the courts except by appeal, but must be considered as legislative or political questions.

It does not appear incumbent upon the prosecuting attorney to prosecute the proceeding as petitioned, nor can it be said that the superior court erred in denying

the writ of mandate after considering the facts before it.

The judgment of the trial court is affirmed.

MOUNT and PARKER, JJ., concur.

[No. 14900. Department Two. January 9, 1919.]

GERRICK & GERRICK COMPANY, *Appellant*, v.
LLEWELLYN IRON WORKS, *Respondent*.¹

CONTRACTS (3)—LOCUS. Preliminary negotiations in this state leading up to a written contract formerly entered into in the state of California, are insufficient to establish the locus of the contract in this state.

CORPORATIONS (263) — FOREIGN CORPORATIONS — PROCESS — DOING BUSINESS IN THIS STATE—AGENT. The liability to personal service of a foreign corporation doing business in this state rests entirely upon statute; and where, under Rem. Code, §§ 3720-3722, a corporation had authority to do business and such authority had been formally revoked and forfeited for failure to pay its annual license fees, personal service cannot be made upon its former statutory agent, in an action which accrued subsequent to the forfeiture; and it is immaterial that his designation as agent had not been formally revoked.

SAME (263). Rem. Code, § 3722, making a foreign corporation, once authorized to do business in this state subject to service in actions arising upon its contracts after revocation of its authority and its corporate entity had ceased in this state, does not apply to a cause of action accruing upon a foreign contract after its withdrawal from this state.

Appeal from an order of the superior court for King county, Hall, J., entered December 18, 1917, upon findings in favor of the defendant, quashing service of process upon a foreign corporation, after a hearing before the court. Affirmed.

Kerr & McCord, for appellant.

Roberts & Skeel, for respondent.

¹Reported in 177 Pac. 692.

FULLERTON, J.—The respondent is a foreign corporation, whose home office is located at Los Angeles, California. In the year 1908, it qualified itself to do business in the state of Washington by filing its articles of incorporation, paying the annual corporation license fees, fixing its principal place of business in the state at Seattle, and appointing one Parvin Wright as its statutory agent upon whom service of process could be made. Wright acted as its agent until the year 1913, when he abandoned the agency to enter into a separate business on his own account. No other statutory agent was thereafter substituted by the respondent, nor was any notice served on the secretary of state of any change or default in the agency. At the time of entering upon business for himself, Wright purchased from the respondent whatever material and supplies it had on hand at its principal place of business in this state, and took over the place of business. The last annual license fee paid by the respondent was in the year 1913, covering the period expiring June 30, 1914. On July 1, 1916, the secretary of state, pursuant to statute governing delinquencies of foreign corporations in such cases, officially canceled the right of the respondent to carry on business in this state by striking its name from the roll of authorized corporations.

In the year 1915, correspondence was opened between the respondent and the appellant corporation, Gerrick & Gerrick Company, respecting bids by the latter upon construction work for certain radio towers at Pearl Harbor, Hawaiian Islands, which the respondent had contracted to erect for the United States government. Some details of the contract were also discussed at Seattle during a trip of an officer of respondent to the city. A formal contract between appellant and respondent was closed on September 17,

1915, at Los Angeles, to which city the president of the appellant corporation had repaired for the purpose. Certain modifications of the original contract were entered into between the parties at the home office of the respondent on September 20, 1915, and January 8 and 10, 1916. The contract provided that the respondent might withhold, for thirty-five days after the completion of the contract, thirty per cent of the moneys earned by the appellant, as security for the satisfaction of all claims and liens arising under the appellant's performance of the work. The appellant completed the work on August 10, 1916, at which time it claimed there was a balance due it of \$8,558.06. which claim was disputed by the respondent. Under the contract fixing the maturity of the thirty per cent withheld as "of a date 35 days after the completion of the contract," the cause of action accrued September 15, 1916. On February 17, 1917, the appellant began an action in the state of Washington to recover upon its claim, and caused summons and complaint to be served upon Parvin Wright, whose appointment still stood unrevoked upon the records of the secretary of state. A like service of the summons and complaint was made upon the secretary of state, under the terms of the statute providing for that character of service in case a foreign corporation doing business in the state fails to designate an agent for the service of process.

The service of summons was attacked by the respondent by a motion to quash, upon the entry of a special appearance for that purpose. The motion was overruled by the judge who sat at the time of its presentation. The respondent thereafter answered, at the same time preserving its special appearance, and praying that the trial court first determine the issue

raised by a plea in the answer to the want of jurisdiction. On the hearing before another judge, it was held that no service of summons had been made upon the respondent subjecting it to the jurisdiction of the court, and that the service of summons and complaint should be quashed, and gave judgment accordingly. From such judgment, this appeal is prosecuted.

It is the contention of the appellant that the court erred in finding as facts that the respondent ceased to do business in this state as a foreign corporation in the year 1914; that Parvin Wright left the employ of the respondent in the year 1913 and was not its representative in any capacity subsequent to that time; and that the contract between the parties was executed and delivered at the home office of respondent in Los Angeles, California; and further, that the court erred in refusing to find that the contract in suit was made in the state of Washington; that a considerable part of the transactions had in connection with the carrying out of the contract were had in this state; and in failing to draw the conclusion therefrom that it had jurisdiction to try out the issues arising out of the contract between the parties.

The contention of the appellant that Seattle was the place of the contract between the parties seems to us to be wholly unfounded in fact. The negotiation between the parties, initiated by correspondence, finally culminated in a written contract formally entered into in the state of California at the home office of the respondent. Preliminaries leading up to a contract are insufficient to establish the locus of the contract, when the agreement as consummated was put into written form by the parties in another state and signed by them in such state.

Another contention of the appellant is that, under our statutes, the service made upon the respondent

was sufficient to subject it to the jurisdiction of our courts, regardless of the place of contract. At common law it was fundamental that personal service of summons upon a defendant must be had upon him within the limits of the state, in order to confer jurisdiction upon a court of that state. Owing to the necessities of modern business, arising from the wide scope of corporate activities, legislation has created an innovation upon the rule by providing that a corporation domiciled in one state may be subjected to service in other jurisdictions where it carries on business through agents. In such cases, its liability to service beyond the confines of its home state rests wholly upon statute, and whether the attempted service of process is sufficient can only be determined by a construction of the applicable statutes. By statute, a foreign corporation is authorized to do business in this state, and sue and be sued in the courts thereof, upon filing in the office of the secretary of state a certified copy of its articles of incorporation, together with a certificate of the appointment of a local agent and the designation of a principal place of business (Rem. Code, §§ 3720-3722). It is required to pay certain filing fees and an annual license fee (Id., §§ 3709, 3711, 3714). It is provided also that, in case any such corporation neglects for a period of two years to pay its annual license fee, it is the duty of the secretary of state to strike the name of the corporation from the records in his office (Id., § 3715). The evidence in this case shows that the respondent had ceased to do business in this state in the year 1913, through the sale of its place of business, the abandonment of his post by its statutory agent, and its subsequent neglect to pay annual license fees. The public declaration of its forfeiture of the right to do business was not made, it

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is true, until July 1, 1916, after it had entered into the present contract. But notwithstanding this fact, we do not think it was subject to service under the terms of our statute. It must be borne in mind that it was being sued upon a California contract, upon which a right of action accrued September 15, 1916, some two and one-half months after the formal declaration of its nonexistence as a corporate entity within this state by the regularly constituted public authority. Service was had upon Wright, who at the time had not acted in the capacity of statutory agent for nearly four years, and who was not otherwise an agent or officer of the respondent. Clearly, we think the service was insufficient under the general statute relating to service upon foreign corporations, found in Rem. Code, § 226. .

Nor do we think it sufficient under the special statute, § 3722 of the same code. The plain intent of this statute is to make a foreign corporation which has once been authorized to do business within the state subject to service in actions arising upon its contracts therein, after it has ceased to exist as a corporate entity under our local laws, only when the cause of action accrued prior to its withdrawal from the state. In this instance, however, the evidence clearly shows that the respondent had withdrawn by abandonment in the year 1914, long prior to the execution of the contract. This being so, it follows further that, under the terms of the statute, the service upon the secretary of state was insufficient to hold the respondent, since such a course is allowable only where suit is brought within the period of limitations upon an action which had already accrued prior to withdrawal from the state.

The appellant construes the statute as warranting service of process upon the statutory agent of a for-

eign corporation at any time within the period of limitations upon a cause of action accruing against it, regardless of the relation existing between the date of withdrawal and the date of the accrual of the action. We are of the opinion the statute is not open to such an interpretation, but that the action must have accrued prior to the withdrawal of the corporation from the state.

The appellant further urges that, inasmuch as Wright was designated as the statutory agent of the respondent for the service of process, and such designation had never been formally revoked, he still continued as the statutory agent upon whom service could be made, in the absence of a showing of his death or removal from the state. That would be true only in the case the statute had so provided. *Green v. Equitable Mut. Life & Endowment Ass'n*, 105 Iowa 628, 75 N. W. 635. But, in the absence of a statutory requirement to that effect, the rule prevails that, where the agent has ceased to act, either by reason of death, removal from the state, revocation of authority, or, as in the instant case, abandonment of the agency by the mutual consent of both principal and agent, service upon an agent theretofore named but no longer existent would be inoperative to confer jurisdiction. This same contention was advanced in the case of *Forrest v. Pittsburgh Bridge Co.*, 116 Fed. 357, and disposed of as follows:

"Subject to some criticism as to form and definiteness, the affidavits submitted show that, at the time of the alleged service of summons, Church did not, in fact, represent the Pittsburgh Bridge Company. This would dispose of the case, but for this argument: That a foreign corporation, having filed its certificate, in pursuance of the Illinois act naming a representative, continues to be suable in the state, by service on such named representative—irrespective of the corpora-

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tion's actual withdrawal from the state, or the actual cessation of the agency—until another certificate has been filed setting forth that the person named in the previous certificate is no longer the corporation's representative.

"It would, perhaps, be competent, by apt legislation, to make this the law; but, in the absence of legislation to that end, we do not feel authorized to hold that a foreign corporation may be held to have been found in the state; or be held to be represented by an agent, who, in fact, held, at the time, no such agency."

In our opinion, the trial court did not err in its conclusion. Its order will therefore stand affirmed.

MAIN, C. J., PARKER, MOUNT, and HOLCOMB, JJ., concur.

[No. 14931. Department Two. January 9, 1919.]

CASHMERE STATE BANK, *Appellant*, v. W. S.

RICHARDSON *et al.*, *Respondents*.¹

FRAUDULENT CONVEYANCES (4)—BADGES OF FRAUD—EFFECT. Retaining possession of a warranty deed by the grantor in failing circumstances is not alone a sufficient badge of fraud to warrant setting aside, as fraudulent, a deed given to a mortgagee of the premises in satisfaction of the mortgage.

SAME (82)—EVIDENCE—BURDEN OF PROOF. In attacking a conveyance as fraudulent, the burden of proof is upon the plaintiff to establish its case, even if no testimony in defense is offered.

SAME (97)—EVIDENCE—SUFFICIENCY—CONSIDERATION. Since a debtor in failing circumstances may prefer a creditor, even to the exhaustion of all his property, a conveyance of mortgaged premises in satisfaction of a mortgage will not be set aside as fraudulent unless the consideration is so grossly inadequate as to amount to fraud; and that does not appear where foreclosure was threatened, the transaction was free from concealment or bad faith and after offer to sell the mortgage to a creditor who did not consider it a safe investment.

¹Reported in 177 Pac. 727.

LIS PENDENS (6)—RELEASE—DISMISSAL. Upon dismissal of a case on the merits, it is proper to clear the record of any cloud by releasing the *lis pendens*.

Appeal from a judgment of the superior court for Chelan county, Hill, J., entered January 10, 1918, in favor of the defendants, dismissing an action for equitable relief, tried to the court. Affirmed.

Charles F. Wallace and Corbin, Whitney & Easton, for appellant.

Crollard & Crollard, for respondents.

HOLCOMB, J.—Appellant instituted this action against respondents for the purpose of having canceled and set aside two mortgages and a deed, claiming that they were fraudulent. The Richardsons and Millers not having appealed, it becomes unnecessary to consider the legality of the two mortgages to the Millers, which were annulled and ordered canceled.

Appellant was the payee and the assignee of two notes executed by the defendants Richardson. The Richardsons, being unable to meet their indebtedness, assigned to the bank seventy-five per cent of the proceeds of their 1915 apple crop for the benefit of their unsecured creditors. The Morris Hardware Company was the payee and owner of a mortgage executed by the Richardsons on 10.88 acres of orchard. When the hardware company learned that the distribution of the proceeds of the 1915 apple crop had been made without considering its indebtedness, it immediately took the matter up with the bank. Failing to get a share out of the 1915 assignment, the hardware company made a proposition to the bank that it would forbear, along with the other creditors, with a *pro rata* division another season, providing it should first be paid out of the 1916 crop interest of about \$330

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that should have been paid in 1915. The bank refused this proposition and stated that it wished it were in the hardware company's shoes as an amply secured creditor. The hardware company offered to sell its mortgage and notes to the bank, but the bank wanted time to think it over. Nothing was done for a week or ten days, when the hardware company informed the bank that something must be done or it would foreclose its mortgage if it could not get a deed to the property. The bank did not accept the hardware company's proposition, and on March 10, 1916, the hardware company was successful in obtaining a deed from the Richardsons.

The bank, learning of the transfer a few days later, did nothing until it reduced its indebtedness to a judgment on December 6, 1916. In February, 1917, appellant, being unsuccessful in supplemental proceedings against the Richardsons, conceived the idea that the taking of the deed by the Morris Hardware Company from the Richardsons, instead of foreclosing its mortgage, was fraudulent, and instituted this action. At the close of appellant's evidence, the court, on motion, dismissed the action as to Morris Hardware Company, and released its property from the *lis pendens* which had theretofore been filed. This appeal involves the question whether the taking of a deed to the 10.88 acres of orchard from the Richardsons by the Morris Hardware Company, instead of proceeding with a foreclosure, was in law a fraud upon the creditors.

Appellant contends that the evidence shows the following badges of fraud. (1) Retention of possession by grantors; (2) conveyance of all debtors' property by deed and mortgage; (3) false recitals in instruments of conveyance; (4) secret trust; (5) generalities; (6) out of usual course of business; (7) inade-

quacy of consideration; (8) unusual mode of payment; (9) absence of evidence, and (10) lack of proof of payment of consideration.

Physical occupation by the grantor of real estate after title has passed by recorded transfer is of no importance unless there is other evidence of bad faith or a secret trust in the estate. Although the proof of all or any of the foregoing badges of fraud, when flagrant, may be sufficient to sustain fraud in some cases, we cannot say from the evidence that appellant's evidence is sufficient to sustain its burden of proof. The trial court had the advantage of seeing and hearing the witnesses testify, and is a better judge of their credibility than are we from the cold typewritten pages before us. The plaintiff must establish his case before the defendant is obligated to offer any evidence in defense, and the mere fact that the defendants here offered no testimony can have no bearing, if, in fact, plaintiff failed to satisfactorily sustain its necessary burden of proof. The law of this state is well settled that an individual debtor in failing circumstances may prefer one creditor over another, even to the exhaustion of his property, if the value of the property given is not so grossly in excess of such creditor's claim, or the consideration is not so grossly inadequate, that it is palpably a fraud upon all other creditors.

There was no proof of any secret trust created by the parties whereby title should, under any contingency, return to the Richardsons.

This case resolves itself into a determination only of whether or not the value of the 10.88 acres of orchard, which appellant claims was from \$9,284 to \$10,880, is so grossly in excess of the Morris Hardware Company's claim at the time of the conveyance that, in

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view of all the circumstances, it amounted to fraud upon the Richardsons' creditors. The hardware company's mortgage was \$3,300, and interest, \$400; and store bill, \$78; Columbia Valley Lumber Company's prior mortgage, \$330; on one Newbauer's mortgage a balance of \$323.95, previously paid by the hardware company (all assumed by respondent); unpaid taxes, \$171; water assessments about \$100; in all aggregating \$4,621.86; and in case of foreclosure, an attorney's fee and costs would have been added. Appellant had the opportunity offered it by respondent to buy its mortgage, but could not see that the property was sufficiently valuable at that time to satisfy its demands or to make it a safe investment. The evidence shows that the orchard had been neglected, that trees were from eight to thirteen years of age and of too many varieties. The testimony as to values offered by appellant was not all of it positive, and much of it was conditional in its application.

We cannot say that, under the circumstances, the consideration involved for the conveyance was so grossly inadequate as to amount to fraud.

As between these parties, the transaction was most open and free from stealth, concealment, misrepresentation, or bad faith.

The appellant further contends that the releasing of the *lis pendens* was error. In view of the trial court's judgment dismissing the action upon the merits, it was also proper to clear the record of any cloud that the adverse party by its action had produced. The appellant was amply protected by its superseding the judgment.

Finding no reversible error, the judgment is affirmed.

MAIN, C. J., MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 14932. Department One. January 9, 1919.]

ISABELLA K. BLOOR, *Respondent*, v. LOREN C. BLOOR
et al., *Appellants*.¹

DEEDS (17)—DELIVERY—ESCROW—CONTROL. Sufficient delivery of a deed is not shown by placing it in escrow with a third party, if it was still in the control of the grantor and there was no present intention to part with title.

SAME (17-1)—DEPOSIT FOR DELIVERY ON DEATH—MUTUAL DEEDS. Since simultaneous deeds of community property by husband and wife to each other, placed in escrow to be delivered to the survivor on the death of either, take effect presently, if at all, and since they negative one another, there can be no effective delivery.

HUSBAND AND WIFE (63)—COMMUNITY PROPERTY—CONVEYANCES BETWEEN—MUTUAL DEEDS—STATUTES. Simultaneous deeds of community property by husband and wife, placed in escrow, the one to be delivered to the survivor and the other to be null and void or recalled upon the death of the other spouse, do not, under a liberal construction of the code, constitute an agreement concerning the disposition of the community property, within Rem. Code, § 5919, which authorizes the making of such a contract jointly, and provides for the manner of its execution and defines its effect; the statute being exclusive in the absence of any common law right to make such a contract.

Appeal from a judgment of the superior court for San Juan county, Pemberton, J., entered May 1, 1918, upon findings in favor of the plaintiff, in an action to quiet title, tried to the court. Reversed.

Ernest B. Herald, for appellants.

Joiner & English, for respondent.

CHADWICK, J.—On April 24, 1916, J. T. Bloor and his wife, Isabella K. Bloor, executed several mutual deeds purporting to convey, the one to the other, all of the community property then owned by them. The deeds when executed were given to, or rather left with, O. J. Bruhns, a justice of the peace, "to

¹Reported in 177 Pac. 722.

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keep." Mrs. Bloor testifies, and, of course, it must have been so understood, that the deeds were to be kept until the death of one of the parties, and the appropriate deeds were then to be put on record or delivered to the survivor. It was the intention of Mr. Bloor to arrange the community affairs so as to avoid the expenses of an administration in the event of his wife's death, and to save his wife the like trouble and expense in the event that she should survive him. He had inquired among some of his neighbors and friends and was advised that the better and least expensive way to dispose of his estate would be to prepare "community deeds."

After the death of Mr. Bloor, the respondent went to Mr. Bruhns, and with him to the auditor's office and filed the deeds from the deceased husband to the respondent for record. The children of Mr. Bloor by a former wife, the appellants here, having murmured against the title, respondent brought this action to quiet her title to all of the lands described in the deeds.

There is a serious question in the minds of some of the judges as to whether a delivery such as the law demands in cases of this kind was ever had, but we have decided to treat the deeds as if they were in fact delivered within the rule of *Nichols v. Oppermann*, 6 Wash. 618, 34 Pac. 162; *Atwood v. Atwood*, 15 Wash. 285, 46 Pac. 240, and *Showalter v. Spangle*, 93 Wash. 326, 160 Pac. 1042; because we are conscious of the fact that a custom has grown up among the people of this state to fix the status and disposition of community property in a testamentary way by the execution of mutual deeds, the one or the other to be delivered to the survivor in case of death.

We had a similar state of facts in *Eves v. Roberts*, 96 Wash. 99, 164 Pac. 915, in that deeds had been exe-

cuted with like intent. In that case we held that there had been no delivery, but we did raise and leave unanswered the question that occurs in this case.

It is fundamental that a deed will not operate as a conveyance unless there is a present intention to part with the title, although possession may be withheld for a time certain or during the lifetime of the grantor.

"It is essential to the delivery of a deed that there be a giving by the grantor and a receiving by the grantee with a mutual intention to pass a present title from the one to the other. It may be made through the hands of an agent and it may be accepted through the hands of an agent, but there must be a mutual intention presently to pass the title. This mutual intention is the cardinal requisite. . . . This is as essential to a deed of gift as to any other. It is elementary that a deed cannot perform the functions of a will, hence cannot be effectually delivered after the grantor's death. When, however, the grantor delivers the deed to a third person in escrow to be held until the grantor's death and then delivered to the grantee, the grantor retaining no dominion or control over it, the delivery is valid and an immediate estate is vested in the grantee at the date of the delivery in escrow, subject to the grantor's life estate." *Showalter v. Spangle, supra*.

It is not enough that a deed be put in safe-keeping. *Atwood v. Atwood, supra*. It must be put beyond the dominion and control of the vendor so that, as between all parties except purchasers for value and in good faith, the title is presently vested and it can be said, as a matter of law, that it has passed out of the one hand into the other, subject only to the grantor's life estate, which equity will preserve pending the contingency upon which the deed is to be put in the hand of the grantee for record and with right of immediate possession.

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Deeds to community property by husband to wife, and by wife to husband, in anticipation of death, are necessarily intended to operate as testamentary bestowals of property. Were the separate property of the grantor involved, or had one member of the community made a deed to a third party, no particular complication would arise, although the question of delivery would occur in almost every case, for those who have direct or collateral interest in the property of deceased persons, and in virtue of their interest have incubated the vice of great expectations, are prone to question the disposition of property where their expectations have not been met.

But the conveyance of community property by the method here employed raises complications which are not so easy of solution. For, although a husband may now deed directly to the wife, and the wife to the husband (Rem. Code, § 8766) if deeds to the same property are executed simultaneously, they must of necessity negative one the other, for they must take effect as of the date they are executed, if they are effective at all. We said in *Eves v. Roberts*, *supra*, "had they been filed for record at the same time the one would have cancelled the other." The leaving of such deeds with a third party, the one to become effective and the other a nullity in the order of time, cannot change the legal effect of the instruments or give them better standing than if they were executed, delivered and filed for record on the same day. For it is not the future effect, but the present intention, that sustains deeds of gift or of testamentary character. Therefore, it must be held that mutual deeds to the same property cancel the subject-matter, for it cannot be said that one having an entire title—we understand that community property is held by the half, and, by

the whole, subject to division and partition in case of death—can convey by one deed and take by another in the same transaction and establish a new relation to, or change the character of, the title.

Deeds made and delivered, or delivered, although it be to a third party, and put beyond the control of the grantor, are sustained solely upon the ground that they are present conveyances. This result is impossible where husband and wife execute mutual deeds to community property, for, from the very nature of things, one of the two deeds, they being made the one in consideration of the other, must fail and become a nullity, for it is not within the foreknowledge of the parties which one may die, leaving the other surviving.

The common law, so far as it throws light upon our present inquiry, the decisions of this and other courts, and our statutes, compel the holding that this manner of disposing of community property in anticipation of death cannot be sustained, for the transaction is tainted by an element of weakness which goes to the very marrow of the transaction, for, notwithstanding the written documents, the intention of the parties at the time is that a part of their contract must fail, otherwise they would not have agreed, as of necessity they must have agreed, that one-half of their contract should in the end be a nullity as of the time of its execution.

This same question has arisen in the state of California. In *Kenney v. Parks*, 125 Cal. 146, 57 Pac. 772, the deeds were delivered to a certain bank. The court said:

“Was the delivery of the husband’s deed to the cashier sufficient to pass the title to the wife? Upon mature consideration, we have arrived at the conclusion that no title whatever passed. While it is not so expressed in the agreement, yet the intention of

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both parties is plain that the party surviving should have his or her deed returned in case the other party should die, and that no title to the property described in the deed of the party surviving should vest. In other words, the plaintiff having survived her husband, her deed is to be returned to her, and the title to her property remain vested in her. Under the law of this state, the title to the property vested presently when the deeds were delivered, or did not vest at all. Yet, as to the plaintiff's property it is apparent that no title ever vested in the husband under her deed. Such being the case as to her property, it is most difficult to see how title to his property, by his deed, ever vested in her. The general principles of law involved in this case are quite fully discussed in *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. 186. In the decision of that case many authorities are cited supporting the conclusion declared, and with that conclusion we are entirely satisfied. It is there said: 'The essential requisite to the validity of a deed transferred under circumstances as indicated in this case is that when it is placed in the hands of a third party it has passed beyond the control of the grantor for all time.' In the present case, by the agreement of the grantor and grantee, it was understood that the grantor's deed was to be returned to him upon the happening of a certain event, to wit: The death of the other party. And at this time it may be assumed that the plaintiff's deed has been returned to her or at least has been treated as of no force and effect. In the *Bury* case it is also said: 'In every case where the deed has been declared invalid by reason of the failure of delivery, it will be found that the grantor reserved some rights over the instrument; that upon the happening of some event, or contingency, or condition, he had the right, if he so disposed, to reach out and take it from the possession of the depository.' The present case comes squarely within that description. Here the grantor reserved the right to recall his deed upon the happening of a certain event; when that event happened, he had the right to reach out and take back the deed, and such reservation is fatal

to a valid delivery. The all-controlling fact in this case, which defeats plaintiff's claim, is that when the deeds were made and delivered to the cashier of the bank the respective grantors did not absolutely part with all future dominion and control over them, but, upon the contrary, the actual intention and understanding of each grantor was that upon the death of the other the survivor should take back his own deed, and that no title vest under it."

In *Long v. Ryan*, 166 Cal. 442, 137 Pac. 29, it was held that an agreement to return the deed of the survivor was not the disqualifying element, for that the law would imply. The logic of this conclusion cannot be doubted, for whether the deed which has become *nullis juris* is returned under a contract made at the time of its execution, or is left with a third party under an implied contract to return it, can make no difference. So whether we follow the theory of contract, as has the California court, or just put ourselves in the place of the parties and admit that the deed made by the surviving spouse was understood to be without force to convey after the death of the other spouse, we reach the same result.

While not an authority for this case, there is much said in *In re Edwall's Estate*, 75 Wash. 391, 134 Pac. 1041, to bear out our argument. In that case deeds were executed in January. In July the parties made mutual wills. The wills were held void under the statute of frauds. It was contended that the deeds furnished written evidence of the contract which would have otherwise been evidenced by the wills. The court said:

"The trouble with this contention is that these deeds, in this respect, are in exactly the same condition as the wills. They are simple warranty deeds in form, as we have noticed, and prove nothing upon their face other than that they were signed and acknowledged as

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the individual deed of each; and, like the wills, the language is wholly devoid of any suggestion that they were executed in pursuance of any such contract as is here relied upon. As deeds they, of course, never became, nor were either of them ever intended to become, effective while both their makers lived. Indeed, it was not intended that the deeds of the survivor ever become effective under any circumstances. Each deed rested for its ultimate effectiveness upon a contingency which might never occur."

Whether it was because there was no way of logically working out the idea of mutual deeds for community property, the one to fail and the other to become effective after the death of one of the parties, or whether it was to avoid the question that must, in any event, occur in every case, and of its own strength lead to vexatious litigation, we do not know; but we do know that the legislature has passed a law under which contracts of testamentary character may be made by a husband and wife, of and concerning community property.

Spouses having no right to convey, the one to the other, in the absence of legislation (Rem. Code, § 8766), the legislature wisely provided a way by which the parties could contract so as to save their contract from all question of delivery or negation.

"Nothing contained in any of the provisions of this chapter, or in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterward to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged, and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and

the same may at any time thereafter be altered or amended in the same manner: *Provided*, however, that such agreement shall not derogate from the right of creditors, nor be construed to curtail the powers of the superior court to set aside or cancel such agreement for fraud, or under some other recognized head of equity jurisdiction, at the suit of either party." Rem. Code, § 5919.

Counsel for respondent have found asylum in this statute. They say:

"These deeds should be construed together, they were made at the same time, constituted one transaction, and when thus considered, we have the husband and wife entering into an agreement concerning the status and disposition of their community real property, to take effect upon the death of either; this agreement is made by the execution of instruments in writing under their hands and seals, acknowledged and certified as deeds of real estate are required to be under the laws of the state. A full compliance with § 5919.

"Give to this transaction the liberal construction required by § 5923 of Rem. Code, and nothing else can be made of it than the making of an agreement in compliance with the provisions of § 5919. There is here every element required in the making of an agreement as to the status and disposition of community real property—their acts are entitled to a liberal construction—and the intent of the parties to consummate the very objects of this section is voiced from the beginning to the end of this record, and this respondent should not be robbed of the result of her and her husband's worthy intentions, simply because there were two instruments instead of one, when under all rules of law the two should and must be construed together, and when so construed, no matter what may be said of the transaction had it not related to community property, it must be held that the title to the real estate in controversy was, at the time of the commencement of this action, in the plaintiff Isabella K. Bloor, free from the claim of these appellants.

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“Agreements made in conformity with § 5919, *supra*, are valid contracts. *McKnight v. McDonald*, 34 Wash. 98, 74 Pac. 1060.”

It may be granted that the parties contracted as they would have contracted if they had followed the statute, but still respondent cannot prevail, for they have not evidenced their contract in the way the statute has said that it should be evidenced. If our reasoning be correct, there are not two deeds, nor even one legal deed, to evidence the contract, for they can have no more legal effect to voice the contract than on the day they were executed, and that, as we have shown, amounted to nothing, for one and both of the deeds were tainted with a virus that poisoned them to their death, in their inception as well as in their end.

Furthermore, the statute contemplates a contract complete in itself, and in writing. It seems to have been drawn with certain intent to avoid the necessity of oral testimony or proof by fragmentary writings. The instrument drawn to evidence the contract must concern the status and disposition of the property, and must be in writing and under the hands and seals of the parties, and witnessed and acknowledged, if it is to be potent as a deed or a will. The writing must state the terms of the contract. It must be mutual and bilateral. A single unilateral contract—granting that one of the deeds so made is effective, for the other must die with the dead man—will not suffice.

But granting, for the sake of argument, that the deed executed by the deceased spouse would otherwise become operative at death, it still falls far short of the contract intended by the statute, for at best it would evidence no more than the contract of the one party, for as said in *In re Edwall's Estate*, *supra*:

“They are simple warranty deeds in form . . . and prove nothing upon their face other than that

they were signed and acknowledged as the individual deed of each; and . . . their language is wholly devoid of any suggestion that they were executed in pursuance of any such contract as is here relied upon."

So far as we are advised, the court has made but two references to § 5919. But we take it that it must have been in the mind of the court, and especially in the mind of the writer of the concurring opinion, in *Board of Trade of Seattle v. Hayden*, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 31 Am. St. 919, 16 L. R. A. 530, that the statute having provided a way for the husband and wife to contract with reference to the status and disposition of community property to take effect after death, the way provided is exclusive. Judge Stiles says in the body of the opinion:

"By that section husband and wife, when they attempt to make any agreement as to the *status* or disposition of the community property, must do so by the execution of an instrument in writing, and under seal, which must be acknowledged and certified, as a deed to real estate."

And Judge Scott says in his concurring opinion:

"This seems to me to clearly preclude the idea of their entering into any such agreement, affecting their property interests to take effect prior to the dissolution of the community, except as expressly provided otherwise."

In *McKnight v. McDonald*, 34 Wash. 98, 74 Pac. 1060, the law was sustained, but the insinuation that, if the parties are to avoid the making of wills, they should follow the "special contract provided for by statute," is strong.

Counsel contend further that, in any event, respondent is entitled to the half-interest conveyed to her by the husband's deed, absolutely and in fee, and is fur-

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ther entitled to a life estate in the remaining half of the property reserved to herself when she executed the deed to her husband. We think this contention has been answered by what has already been said, namely, that the deeds and the manner of their delivery, if there was delivery, do not of themselves establish that the grantor in each passed a present title to the grantee, subject only to a reserved life estate in the grantor, and resort must be had to parol evidence to establish such a condition. The very nature of the transaction carries the presumption that the vesting of title was dependent upon survivorship, and that until the death of one, neither deed should take effect, and then only the deed of the one who had died. As it could not be known before the death of one, which would survive, we have here a parol testamentary disposition attempted, which fails because not in accordance with the statute. The respondent's deed to her husband was not executed with a present intent to convey in any event, but only upon a possible contingency, and therefore lacks an essential element of a deed of gift or testamentary deed; and further, the deed does not purport to reserve a life estate; so that if we give to the deed the effect which is contended for, we would be led into the position of making a new contract which was not in the mind of either party at the time the deeds were executed. The form of the instruments precludes the idea that either party intended to convey anything less than a fee simple title.

Being convinced that the title of respondent cannot be sustained under the deed executed by her husband; that the writing, whether considered as one deed or two deeds, does not evidence a contract such as is permitted under the statute, and that the deed relied on does not vest a life estate in the respondent, we con-

clude that the decree of the lower court must be reversed, and the cause remanded with directions to dismiss the suit.

MAIN, C. J., MACKINTOSH, MITCHELL, and TOLMAN, JJ., concur.

[No. 14943. Department One. January 9, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v. DIAMOND
ICE & STORAGE COMPANY, *Appellant*.¹

FISH (18)—OFFENSES—FAILING TO REPORT TONNAGE TAX. Evidence that fish frozen and preserved by accused might have been caught in Oregon, British Columbia, Alaska, or the state of Washington, does not sustain a conviction for failure to report and pay a tonnage tax on fish frozen by accused, caught within the waters of the state of Washington.

SAME (19)—OFFENSES—INFORMATION—VARIANCE. Under Rem. Code, § 2057, requiring an information to be direct and certain, an information charging failure to report and pay a tonnage tax upon fish frozen and preserved by accused, caught within the state of Washington, does not sustain a conviction for failure to report and pay a tonnage tax upon fish which were caught in the waters of Alaska, British Columbia, or elsewhere, even though that also be an offense under the statute.

Appeal from a judgment of the superior court for King county, Abel, J., entered April 24, 1918, upon a trial and conviction of failing to report and pay a tax on fish frozen by the accused. Reversed.

James B. Howe and *A. J. Falknor*, for appellant.

Alfred H. Lundin and *Frank P. Helsell*, for respondent.

TOLMAN, J.—On September 20, 1917, the prosecuting attorney of King county filed an information in

¹Reported in 177 Pac. 634.

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the superior court for that county, the charging part of which is as follows:

“Said Diamond Ice & Storage Company, Inc., a corporation, and Q. G. Peniston, in the county of King, state of Washington, on and from March 31, 1917, continuously up to and including July 31, 1917, were engaged in freezing and preserving in ice food fish caught within the waters of the state of Washington, and said Diamond Ice & Storage Company, Inc., a corporation, and Q. G. Peniston, and each of them, upon said 31st day of July, 1917, did wilfully and unlawfully neglect and refuse to make a report to the fish commissioner of the state of Washington for said period between the 31st day of March, 1917, and the 31st day of July, 1917, stating the quantity in pounds of all fish so preserved or frozen by them, as required by law, and said Diamond Ice & Storage Company, Inc., a corporation, and Q. G. Peniston, and each of them, have ever since wilfully and unlawfully failed, neglected and refused to make such report to said fish commissioner as required by law, and said defendants during all of said period, and ever since, have wilfully and unlawfully neglected and refused to remit to said fish commissioner the sum of one dollar (\$1) per gross ton for each ton, or fraction thereof, of food fish so preserved and frozen by them between the 31st day of March, 1917, and the 31st day of July, 1917, as required by law.”

There was a dismissal as to Q. G. Peniston, and the cause proceeded to trial against the Diamond Ice & Storage Company before the court, a jury having been waived, resulting in a judgment of guilty and the imposition of a fine, from which an appeal was duly taken.

The testimony on behalf of the state tended to show that the appellant was conducting a general warehouse and cold storage business in Seattle, and as a part thereof had been engaged in freezing fish during the period of time mentioned in the information, and that

it did not, on July 31, 1917, or subsequently, file any report or pay any tonnage tax on fish frozen by it during such time. In the attempt to show that some of the fish so frozen were caught within the waters of the state, as charged in the information, there was introduced the testimony of a witness engaged in the wholesale fish business, whose company operated a boat in the waters of Puget Sound for the purpose of buying salmon trout, and it appears therefrom that the boat made 24-hour trips from Seattle for the purpose of buying and bringing in the fish. The witness said:

“A. The boat buys the salmon. It goes around amongst all the boats and buys them. Q. You don't know where the fish were caught that you bought? A. No, I don't know where they were caught, but— Q. I object unless you know. Mr. Helsell: Let him answer. He says he knows where they were bought. Q. (Mr. Helsell) Who sells them? A. The Greek fishermen go out and catch them in nets at night and when they take the nets in in the morning the buyer goes around amongst them and picks them up and brings them in. Q. You don't know where any of them were caught? You were not present? A. No, sir.”

The witness further testified that, on May 12, 1917, of the fish brought in by this boat, 2,645 pounds of salmon trout were placed with appellant for freezing.

Again, another witness, also a wholesale fish dealer, testified that, on July 28, he placed with appellant for freezing 145 pounds of sole and thirty pounds of perch which were shipped to him from Whidbey Island and Grays Harbor, respectively, but the witness did not pretend to know where, or by whom, any such fish were caught, saying that he bought from fishermen and fish brokers wherever he could get fish.

Mr. Peniston, appellant's manager, was called as a witness for the state, and testified that his company

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froze fish for any one who sent them to the plant for that purpose, that the fish go through four or five hands before they come to the plant, and the first any one connected with appellant's business sees or knows of them is when the fish are dumped off a wagon through a chute and into the appellant's basement, saying in answer to a question by the prosecutor:

"A. They asked me to make a report of the fish caught within the state of Washington waters, and on a certain side of the Columbia river and so on. But I couldn't tell. The first time I see the stuff, it is dumped off the wagons through the chute into our basement. The fishermen receive the fish from all different points and they pack it in ice and use out of that to sell; and when they get an accumulation over and above what their sales will be, they load it in a wagon and send it to storage. Some of that might come from Oregon, some of it might come from British Columbia, some of it might come from Alaska. But really I don't believe the wholesale dealer in fish could swear where any particular fish he received comes from."

This testimony, which was all the proof upon this particular point, clearly falls far short of proving with the certainty required under a penal statute that appellant was engaged in freezing and preserving in ice food fish caught within the waters of the state of Washington, as charged in the information.

But it is argued that, if the evidence is insufficient to prove that appellant had in fact frozen fish caught within the waters of the state, yet nevertheless appellant is guilty under the statute, because it is contended that the statute requires the report and the payment of the tonnage tax from all those engaged in curing and freezing fish, without regard to where the fish were caught. Assuming, without deciding, that such is the intention of the statute, is the state

not limited in this case to the charge made in the information? As we understand the rules of pleading in criminal cases, the state is bound by its allegations in the information, and having charged in effect that appellant failed to report and pay a tonnage tax upon food fish frozen by it caught within the waters of this state, which no doubt charges an offense under the statute, it cannot be permitted in support of that charge to prove that appellant failed to report and pay a tonnage tax upon food fish frozen by it which were caught in the waters of Alaska, British Columbia, or elsewhere, even though that also be an offense under the statute. We think, under our statute, Rem. Code, § 2057, requiring the information to be direct and certain, that the state is bound by the charge as made, and must prove the offense to have been committed as there alleged, in order to sustain a conviction. 1 Wharton, Criminal Evidence, § 92; 13 Ency. Evidence, 640; *State v. Gifford*, 19 Wash. 464, 53 Pac. 709; *State v. Morgan*, 21 Wash. 355, 58 Pac. 215.

Reversed, with directions to dismiss.

MAIN, C. J., and MITCHELL, J., concur.

CHADWICK and MACKINTOSH, JJ., concur in the result.

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Statement of Case.

[No. 14953. Department Two. January 9, 1919.]

JOHN J. THOMAS, *Respondent*, v. CHARLES E. THOMAS
et al., *Appellants*.¹

MASTER AND SERVANT (17)—ACTION FOR WAGES—EVIDENCE—SUFFICIENCY. A verdict allowing \$45 per month for services is not excessive, the question being for the jury, where plaintiff worked as a cook and farm hand, the going wages for which were from \$25 to \$45 per month, and also worked long hours and performed other duties requiring more skill.

WORK AND LABOR (4, 14)—SERVICES BETWEEN PERSONS IN FAMILY RELATION—EVIDENCE—SUFFICIENCY. A finding of an express contract of employment of a son and brother-in-law to work on a farm as cook and farm hand is sustained by evidence that he performed the labor under the understanding that defendants intended to pay him satisfactory wages.

SAME (11)—PLEADING—ISSUES, PROOF AND VARIANCE. In an action for wages for services performed on a farm by a son and brother-in-law, evidence of talk of payment by deeding an interest in the farm is unavailing where it was not affirmatively pleaded in the answer.

TRIAL (83, 100)—INSTRUCTIONS—REQUEST. The designation of instructions as requested by either party, while not commendable, is not error, although commented on by counsel, where the jury was instructed to consider the instructions as a whole, and were not unduly influenced.

TRIAL (17)—RECEPTION OF EVIDENCE—MATTERS NOT CONTESTED. It is not error to exclude evidence upon an issue which was admitted in open court and not denied by answer.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered December 1, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

L. C. Jesseph, for appellants.

W. Lon Johnson and *Albert I. Kulzer*, for respondent.

¹Reported in 177 Pac. 680.

HOLCOMB, J.—Appellants are a son and a brother-in-law of respondent. In 1910, they became owners in common of a 240-acre ranch, with about ten acres cleared, near Chewelah, Washington. Soon afterwards they employed respondent to work on the farm, but neither the time nor the amount of wage was specified at the time, further than that the same “should be satisfactory to him.” During respondent’s seven years, four and a half months’ employment, excepting about five weeks of sickness, he arose at 5 a. m., did the cooking, baking and washing, assisted for about one year in constructing one and one-half miles of drainage ditches, cleared land for crops, worked as a carpenter in building extensive flumes, and did other general farm work, usually retiring between 9 p. m., and midnight during the busy season. The record shows that respondent faithfully performed his part of the agreement. At the end of respondent’s years of toil, appellants refused to pay him wages. Respondent brought suit, and alleged that his services were reasonably worth the sum of \$75 per month and board. Appellants answered by a general denial. The cause was tried to the court and a jury. The jury returned a verdict of \$4,000 in favor of respondent, upon which judgment was entered.

Appellants assign that it was error, (1-2) to overrule the motions for a new trial and for judgment *non obstante*; (3) to enter judgment for the plaintiff; (4) to designate instruction No. 2, “Requested by defendants and given by the court;” (5) to allow counsel for plaintiff in his argument to refer to the designation given to such instruction; and (6) to refuse to permit the witness Charles Roberts to testify as to the interest owned by each defendant in the land and the manner in which such interest was acquired.

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Appellants contend that the verdict of the jury is excessive, for the reason that it would average about \$45 per month for the entire period, while the evidence shows that the going wage for farm hands during the busy season was \$40 per month, and for a cook during the same period, from \$20 to \$25 per month. We find evidence in the record that, where a farm hand did the cooking he usually received from \$5 to \$6 per month more than the other laborers. There was also evidence that the ditch construction work was worth from \$3.50 to \$4 per day, that respondent so informed appellants, and that he expected such wages. All the facts relating to the value of respondent's services were for the jury to decide, and we cannot say that its decision was not commensurate with the facts, considering the long hours and various duties of respondent, and his several more skilled and valuable services than those of a mere farm laborer and cook.

It is contended that the law does not imply a contract between parent and child. The jury found that there was an express contract of employment, and the evidence shows that appellants intended to pay respondent satisfactory wages. It is said in *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352:

"It is a rule universally recognized that, when the services are rendered by one who is a member of the family of the employer, the law will not imply a contract to pay for the services from the mere fact that they have been rendered upon the one hand and benefits thereof received upon the other, as in the case of strangers. This is also held to be the rule when there is no actual blood relationship existing between parties, provided they sustain to each other the ordinary relations of members of the same family. It has been held, however, that when the family relationship exists it is not necessary to prove the terms of a direct and positive contract, but that proof may be

made of words, acts, and conduct of the parties, and circumstances from which the inference may follow that there was an understanding that the services were not to be rendered gratuitously; that when such is the case there is a contract upon which the value of the service may be recovered, and it is for the jury to say, from all the conduct of the parties and from the circumstances in evidence, whether there was in fact such an understanding or agreement. This rule is sustained by the following: *Young v. Herman*, 97 N. C. 280 (1 S. E. 792); *Collins v. Williams*, 21 Ind. App. 227 (52 N. E. 92); *Dash v. Inabinet*, 58 S. C. 382 (31 S. E. 297); *Hart v. Hess*, 41 Mo. 441; *Murrell v. Studstill*, 104 Ga. 604 (30 S. E. 750); *Smiley v. Scott*, 77 Ill. App. 555; *Tumilty v. Tumilty*, 13 Mo. App. 444; *McGarvy v. Roods*, 73 Iowa 363 (35 N. W. 488)."

This rule was also reaffirmed in *Pelton v. Smith*, 50 Wash. 459, 97 Pac. 460.

While there seems to have been talk of appellants deeding an interest in the farm to respondent in payment of his services, this can avail appellants nothing because not affirmatively pleaded and tendered in their answer, and only aids respondent in showing that payment of some kind was intended to be made to him.

It is contended by appellants that, by reason of counsel for respondent commenting on instruction No. 2, which was designated "Instruction requested by defendants and given by the court," the giving of such instruction in that way was reversible error.

"Instructions, when given, are those of the court, and the better practice is to make no distinction between that portion which originated with the judge and that which originated with either counsel, and to give all proper requested instructions as emanating from the court itself. However, the characterizing of instructions as given at the request of one party or the other is not error, or at least not available error." 38 Cyc. 1773.

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Although the designation of instructions as requested by either party is not commendable, in this case it cannot be said that the jury was influenced thereby, in view of the fact that the court gave instruction No. 7, as follows:

“The instructions given the jury are and constitute one connected body and series and should be so regarded and treated by the jury; that is to say, you should apply them to the facts as a whole, and not detach or separate any one instruction from either or any of the others.”

It cannot be presumed that the jury disregarded this instruction.

There being no issue relating to the ownership or management of the property, these having been admitted in open court and not denied by answer, appellants' last assignment of error is without merit.

The jury was the tribunal to decide all the issuable facts in the case, and we are concluded by its determination thereon. Not finding any reversible errors in the trial as conducted by the court, the judgment is affirmed.

MAIN, C. J., FULLERTON, MOUNT, and PARKER, JJ.,
concur.

[No. 14964. Department One. January 9, 1919.]

R. F. GOLAY, *Respondent*, v. NORTHERN PACIFIC
RAILWAY COMPANY, *Appellant*.¹

RAILROADS (66, 67)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—DUTY—OBSTRUCTED VIEW. Plaintiff was guilty of contributory negligence as a matter of law, in driving his automobile upon a railroad crossing, on the theory that a person taking no precautions is not entitled to any presumption that a train was not exceeding the speed limit, where he was familiar with the situation and train schedule, and only listened momentarily before nearing the crossing, his vision on approaching was obstructed by a freight car on a side track, and he drove in low gear past the obstruction without looking until upon the track, when others in no better position by looking saw the train (MAIN, C. J., and MITCHELL, J., dissenting).

Appeal from a judgment of the superior court for Pierce county, Card, J., entered May 21, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for appellant.

Govnor Teats, Leo Teats, and Ralph Teats, for respondent.

MACKINTOSH, J.—For three weeks prior to the incident which gave rise to this action, the respondent had been operating a garage in the town of Roy, situated about one hundred feet west of the track of the appellant company and nearly opposite the only railroad crossing in the town. Between the main track and the respondent's place of business there was a side track on which it was customary for freight trains to stand awaiting the passing of the appellant's south-bound passenger train, which was due to arrive in

¹Reported in 177 Pac. 804; 181 Pac. 700.

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Roy at about 10:20 a. m. The respondent had been busy on the morning of March 27, 1917, about his garage and had heard a freight train switching, but did not know whether the passenger train had arrived, although he was familiar with that train's schedule and with the fact that freight trains took the siding for the purpose already referred to. The respondent backed out of the garage in an automobile in which he was about to take a passenger to some place in the country, and as the machine reached the street and was being turned around, respondent says he listened for the passenger train, but did not hear it. The testimony of several witnesses is that the train had been ringing its bell for a considerable distance and had blown the whistle for the crossing, but in view of the fact that the respondent and some of his witnesses testified that they heard no bell or whistle, we assume, for the purposes of this action, that no bell was rung nor whistle blown. He then proceeded from the garage to the crossing with his machine in low gear, going at the rate of four miles per hour. As he approached the crossing, the freight train standing on the side track obstructed his view of the main track, because of the fact that the rear car of the freight train was situated some fifty to seventy-five feet beyond the crossing. He made no effort to look for an approaching train, however, until the front wheels of his automobile were upon the first rail of the main track, although before that time the rear freight car had ceased to be an entire obstruction to a view of the main track for some distance. When he did look he saw the oncoming passenger train within a short distance, and attempted to cross the track ahead of it, but was unsuccessful, and for the damages which occurred to his person and to his automobile he brought this

action, which resulted in a verdict in his favor in the trial court. While the respondent was some distance from the railroad tracks, witnesses, who were in close proximity to his machine at the time, and who were in no more advantageous position so far as observing the approach of a train was concerned than was the respondent, heard and saw the train approaching by observing the smoke stack above the freight cars, and called to the respondent, recognizing the perilous position in which he was about to place himself, and warned him of the approach of the train, but these warnings were not heard by him, and he proceeded as we have indicated. The train was being operated at a speed greatly in excess of the speed provided for in the ordinance of the town of Roy when it struck the respondent.

Under these facts, the appellant asserts that the respondent was guilty of contributory negligence, as a matter of law, while the respondent contends that a question of fact for the jury was presented, and that the respondent was entitled to the benefit of that rule of law which provides that a person in approaching a railroad track has a right to assume that the railroad company will not operate its trains in excess of the limits prescribed in statute or ordinance.

In determining the question presented in this case, we have to take into consideration two lines of authority, each of which is represented by several cases decided by this court. The first line establishes the doctrine that a pedestrian or driver of any vehicle cannot recover for injuries occasioned by a car or train when the evidence discloses that he approached the track where he could have, had he looked in that direction, observed an approaching car or train, but did not look and proceeded into the zone of danger with-

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out taking any reasonable precaution to avoid the collision, and that he would be guilty of contributory negligence, as a matter of law, notwithstanding the negligence on the part of the railroad company in operating trains at an unlawful rate. This line of decisions is represented by the following cases: *Woolf v. Washington R. & Nav. Co.*, 37 Wash. 491, 79 Pac. 997; *Mey v. Seattle Elec. Co.*, 47 Wash. 497, 92 Pac. 283; *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, 22 L. R. A. (N. S.) 471; *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458; *Fluhart v. Seattle Elec. Co.*, 65 Wash. 291, 118 Pac. 51; *Slipper v. Seattle Elec. Co.*, 71 Wash. 279, 128 Pac. 233; *Stueding v. Seattle Elec. Co.*, 71 Wash. 476, 128 Pac. 1058; *Bardshar v. Seattle Elec. Co.*, 72 Wash. 200, 130 Pac. 101; *Aldredge v. Oregon-Washington R. & Nav. Co.*, 79 Wash. 349, 140 Pac. 550.

The second line represents those cases where the pedestrian or driver of a vehicle has approached the railroad track and has exercised some degree of care and caution in attempting to apprise himself of the approach of a car or train, and in those cases it has been held that, when he has looked or listened and has not seen nor heard the car or train approaching, or when he has looked and has seen the car or train approaching and has not been able, by reasonable care, to determine the speed of its approach, he has the right then to assume that the railroad company will not place a car or train within striking distance of him by operating such car or train at an unlawful rate of speed. There is then presented a question of fact for the jury to determine whether he has exercised a reasonable degree of care and caution for the purpose of his self-protection. This line of decisions is represented by the following cases: *Averbuch v.*

Great Northern R. Co., 55 Wash. 633, 104 Pac. 1103; *Richmond v. Tacoma R. & Power Co.*, 67 Wash. 444, 122 Pac. 351; *Merwin v. Northern Pac. R. Co.*, 68 Wash. 617, 123 Pac. 1019.

The distinction between these two lines of cases consists in this: That in the one the pedestrian or driver of a vehicle has taken no precaution to protect himself, and is, therefore, not entitled to any presumption that the railroad company is operating its car or train within the legal speed limit, and is, as a matter of law, guilty of contributory negligence, his action being such that reasonable men cannot honestly differ as to its being negligent. In the other, the pedestrian or driver of a vehicle has taken some precaution for his own protection, and having attempted to see or hear, and not having seen nor heard, or having attempted to see, and having seen, a car or train approaching has been unable, though using reasonable care, to gauge its speed, has, in either event, the right to assume that the railroad company will not operate the train unlawfully. In all those cases it is for the jury to say whether he has exercised such a degree of care as a reasonable man would under the same circumstances, and to determine whether the negligence of the railroad company, or his own negligence, if it existed, was the proximate cause of the injury.

In the case at bar, the standard of conduct for a person in the respondent's position is so obvious that it applies to all persons, and the respondent has clearly failed to measure up to that standard under the evidence in the case, and he was not entitled to have his case go to a jury. He was familiar with the situation, knew that the passenger train was due about that time, knew that the freight train standing

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Dissenting Opinion Per MAIN, C. J.

on the side track was awaiting the passing of a passenger train; yet all he did was to listen momentarily as he backed out of his garage, although, as he testified, he had not heard the passenger train and did not know whether it had passed or not, because of the fact that the engine from the freight train was blowing off steam and making considerable noise. He then proceeded without looking, and the evidence shows that others in no better position, by looking, saw the train. He drove past the obstruction to his vision furnished by the standing freight train, across the intervening space of a few feet between the side track and the main track, and drove on the main track before he looked. He listened where it was difficult to hear, and did not look where he could first have seen.

Reasonable men cannot honestly differ in the conclusion that such conduct was negligent and the proximate cause of his injury, and therefore, as a matter of law, he was guilty of contributory negligence. The appellant is entitled to a judgment relieving it of any responsibility, and the action of the lower court is reversed and the cause dismissed.

CHADWICK and TOLMAN, JJ., concur.

MAIN, C. J. (dissenting)—I am unable to see any substantial distinction between this case and the case of *Brandt v. Northern Pac. R. Co.*, *post* p. 138, 177 Pac. 806, 181 Pac. 682. If the question of contributory negligence in that case was one of fact for the jury, it must necessarily follow that the question of contributory negligence in this case is likewise for the jury; in principle, the cases are the same. I therefore dissent.

MITCHELL, J., concurs with MAIN, C. J.

ON REHEARING.

[*En Banc*. May 31, 1919.]

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein, and for the reasons there stated, the judgment is reversed.

[No. 14957. Department One. January 9, 1919.]

CARL BRANDT, *as Administrator etc., Respondent*, v.
NORTHERN PACIFIC RAILWAY COMPANY *et al.*,
Appellants.¹

RAILROADS (66, 67, 71)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—DUTY—OBSTRUCTED VIEW—QUESTION FOR JURY. Deceased was not guilty of contributory negligence, as a matter of law, in driving an auto truck upon a railroad crossing, upon the theory that a person who has exercised some degree of care in apprising himself of the approach of a train has a right to assume that any approaching train is operating at a lawful speed, and the question is for the jury, where it appears that his view on approaching was obstructed and that he looked first in one direction and then in the other, failing to see the train, and there was evidence from which the jury may have found that he might have seen the approaching train if it had been running at a lawful rate of speed, or had warning been given, and that no bell or whistle was sounded until it was too late for him to stop the auto.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered April 27, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Affirmed.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for appellants.

Forney & Ponder, C. D. Cunningham, and J. H. Jahnke, for respondent.

¹Reported in 177 Pac. 806; 181 Pac. 682.

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Opinion Per TOLMAN, J.

TOLMAN, J.—This action was brought to recover damages for the death of A. Forstrom, who was killed at the crossing of Summa street and the main line of appellant's railroad, in the city of Centralia, on August 13, 1917. From a verdict and judgment in favor of the respondent, appellant appeals, raising the single question that the evidence was insufficient to go to the jury.

The deceased, Forstrom, owned a dairy farm in the country, and hauled his own and his neighbor's milk to the condensery. On the day of the accident, and for some two months preceding, he had used an auto truck for this purpose. On the morning of the day in question, accompanied by his nine-year-old son, he had driven to the condensery with his milk, and was returning with the truck loaded with empty milk cans. He stopped at the warehouse of the Standard Oil Company, a short distance east of the crossing where the accident afterwards occurred, for a few moments, and backing out from there onto the street, proceeded westward at about six miles per hour. The warehouse and a box car standing on the spur track obstructed his view of the main line of appellant's railroad toward the south, from which direction the train was coming, until after he crossed the spur track, which was distant some thirty-six and one-half feet from the nearest rail of the north-bound main line track. At about the time the spur track was passed, the boy testified that he looked south, but could see nothing of an approaching train because of an embankment some eight feet high, overgrown with grass and weeds, which lay east of the main line and began about 100 to 120 feet south of the crossing and extended southerly a distance of 175 to 180 feet, and hearing no train, he turned in the other direction to look for a

train from the north, so that he failed to see or hear the approaching train until it was too late to avoid the accident.

Another eyewitness testified that, shortly after crossing the spur, Forstrom turned his head toward the south as though looking for an approaching train, and then continued his course with his speed unchecked until an instant before the accident. Several witnesses testified to obstructions rendering it difficult, if not impossible, for one pursuing the course deceased was following to see an approaching train until it was within a short distance of the crossing.

There was a sharp conflict in the testimony as to whether warning was given of the approaching train, by sounding either whistle or bell, until it was too late to enable the deceased to avoid the accident, though it appears that the engine emitted considerable smoke and the train made considerable noise as it approached. The train admittedly was late and running a few minutes behind its regular schedule time. It is admitted that the train was running at a speed of thirty-five to forty miles an hour at the instant of the collision with the truck driven by the deceased; and it is also admitted that, by ordinance, the speed of trains is limited to ten miles per hour within the corporate boundaries of the city of Centralia, and that the center line of the street, where the accident occurred, made the southerly boundary of said city. There was evidence that the truck as loaded and going at a speed of six miles per hour could be stopped by an ordinarily skillful and careful driver in "probably twenty feet."

Under these conditions, deceased approached the crossing, apparently unconscious of the approach of the train until it was somewhere between fifty and 150

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feet from the crossing, when the engineer gave the alarm signal by several sharp blasts from the whistle, and at the same instant applied the brakes. Deceased, also at that instant, apparently threw out his clutch, applied his brakes and brought his truck to a stop, with the front wheels upon or just over the first rail, and seems to have attempted to reverse for the purpose of backing off the track, then realizing that he could not succeed in that attempt, threw up his hands and cried, "Whoa! Whoa!" just as the engine was upon him.

It is a familiar rule in this state that, where the evidence and the inferences to be deduced therefrom are such that reasonable men may arrive at different conclusions, the question of the contributory negligence of the deceased, like that of the negligence of the defendant, is for the jury to determine. And in passing upon the question here presented, we must accept as true that view of the evidence which is most favorable to the respondent. The obstructions to the view of one approaching the track upon the highway were largely placed there by the appellant company, and were as well known to it as to the deceased. The jury may, under the evidence, have determined that the deceased, because of such obstructions, had a limited view only, but could, from the point at which the evidence indicates that he or his son looked, have seen an approaching train if, running at a reasonable or lawful rate of speed, it was within the danger zone, for manifestly the danger zone would increase in extent as the speed of the oncoming train increased, and the extent of the danger zone, if the train were traveling ten, fifteen, or even twenty miles per hour, would be very materially less than under the facts shown here, which were that, after the application of the

brakes for a distance of perhaps 150 feet, the train was still going at a speed of thirty-five to forty miles per hour at the time of the impact.

Under the evidence, also, the jury may have found that no warning was given of the approach of the train, except the usual sounds and sights occasioned by its operation. And it being admitted that it was not running on the usual schedule, might not the jurors, as reasonable men, conclude that these were the proximate causes of the accident, and that, under such conditions, the deceased, notwithstanding the noise caused by the operation of his truck loaded with empty milk cans may have interfered with his hearing, was acting as a reasonably prudent man when he relied upon his limited view of the track and the absence of the sound of bell or whistle?

That we, sitting as jurors, might have found otherwise is no answer to the fact that there was substantial evidence before the jury to the effect indicated. And the jury having believed that evidence, rather than that which contradicted it, we are powerless to interfere. This subject has been recently considered in the case of *Golay v. Northern Pac. R. Co.*, ante p. 132, 177 Pac. 804, 181 Pac. 700, and we think the facts in this case bring it within the second rule there referred to, which is:

“The second line [of decisions] represents those cases where the pedestrian or driver of a vehicle has approached the railroad track and has exercised some degree of care and caution in attempting to apprise himself of the approach of a car or train, and in those cases it has been held that, when he has looked or listened and has not seen nor heard the car or train approaching, or when he has looked and has seen the car or train approaching and has not been able, by reasonable care, to determine the speed of its approach, he has the right then to assume that the rail-

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Opinion Per Curiam.

road company will not place a car or train within striking distance of him by operating such car or train at an unlawful rate of speed. There is then presented a question of fact for the jury to determine whether he has exercised a reasonable degree of care and caution for the purpose of his self-protection. This line of decisions is represented by the following cases: *Averbuch v. Great Northern R. Co.*, 55 Wash. 633, 104 Pac. 1103; *Richmond v. Tacoma R. & Power Co.*, 67 Wash. 444, 122 Pac. 351; *Merwin v. Northern Pac. R. Co.*, 68 Wash. 617, 123 Pac. 1019."

The cases there cited from this court amply bear out the rule as stated, and after an exhaustive examination of the evidence in this case, we are satisfied that it comes within the rule referred to, and was properly submitted to the jury.

The judgment will be affirmed.

MAIN, C. J., MACKINTOSH, CHADWICK, and MITCHELL, JJ., concur.

ON REHEARING.

[*En Banc.* May 31, 1919.]

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein, and for the reasons there stated, the judgment is affirmed.

[No. 15013. Department One. January 9, 1919.]

C. F. ORTMAN, *Appellant*, v. KITTITAS COUNTY *et al.*,
Respondents.¹

TAXATION (34, 37)—STATE LANDS—LIEU LAND SELECTIONS—TITLE IN ABEYANCE. Under the enabling act, granting sections 16 and 36 to the state for school purposes, lands patented before survey and found on extension of the survey to be within section 36, the title to which had by suit been quieted in the state, although the patentee was left in possession pending settlement of lieu land selections, is not subject to taxation, since the title was in the state regardless of the suit to quiet title.

SAME. Under Rem. Code, § 6635-3, providing for lieu land selections in exchange for sections 16 and 36 in Federal Forest Reserves, and requiring conveyance by the state when title to the selected lands became vested in the state, title to the school lands remains in the state until the conditions are fulfilled, and are not subject to taxation; notwithstanding a patentee from the government in possession may thereupon become the owner by compliance with the state or Federal conditions therefor.

SAME (34, 200) — STATE LANDS — RIGHT OF ACTION TO SET ASIDE TAX. A patentee from the government prior to survey, of land in section 36, the title to which had been quieted in the state, but who was left in possession pending negotiations of lieu land selections which would probably result in his becoming the owner of the land, may maintain an action to cancel taxes improperly assessed against the land while the title was in the state.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered July 30, 1918, upon sustaining a demurrer to the complaint, dismissing an action to cancel a tax. Reversed.

Pruyn & Hoeffler, for appellant.

Arthur McGuire, for respondents.

MACKINTOSH, J.—The appellant is seeking the cancellation of taxes, his complaint setting up the following statement of facts, which were admitted by the re-

¹Reported in 177 Pac. 721.

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Opinion Per MACKINTOSH, J.

spondents' demurrer: The appellant is in possession of section 36, township 21, range 12 east, and holds a contract of purchase of that property from one Walker. There was issued to Walker by the United States government in 1911 a patent to this property, which had been settled upon by Walker before the public survey had been extended over it. Upon the survey being made, the land was found to be in section 36, and after the issuing of the patent, the state of Washington, in January, 1912, began an action in Kittitas county against Walker to obtain possession of the property and to quiet title to the same, the state claiming under the terms of the enabling act sections 16 and 36, surveyed or unsurveyed, not otherwise appropriated, within the state at the time the state was admitted to the Union, these sections having been granted by Congress for the use of the common schools of the state. The complaint alleges that this action by the state against Walker was determined in favor of the state, and that a judgment and decree was rendered to that effect, but not entered for the reason that negotiations at that time were pending between the state and the Federal government looking to the settlement of the title to these sections, which were unsurveyed at the time the state was admitted to the Union, and it was agreed that Walker be left in possession of the property awaiting an adjustment that would probably be made at the conclusion of the negotiations between the two governments in relation to the title. Subsequently, the legislature of the state and the Congress of the United States entered into an agreement whereby the state should release its claim to sections 16 and 36 in the forest reserves within the state, and the state should take lands in exchange therefor on the surveyed public domain of the United

States situated in the state of Washington. Appropriations were made and work was done in determining the numbers of sections 16 and 36 lying within the Federal Forest Reserve within the state of Washington, and it has been determined that the property here in controversy is situated in such forest reserve. The work has progressed so far that little remains to be done to complete it, and the state has already located large tracts of land in lieu of sections falling within the Federal Forest Reserve. The complaint alleges that the matter in controversy between Walker and the state will be speedily adjusted, at which time the title of Walker to the land in question will be confirmed. The complaint then alleges that taxes for the years 1912 to 1917, inclusive, have been levied against this property by the county of Kittitas, notwithstanding that the title of said Walker to the property is in abeyance, and alleging that such assessments are void and constitute a cloud on the title. The complaint further alleges that, as soon as the cruising and surveying of sections 16 and 36 of the Federal Forest Reserves of the state of Washington is complete and lieu lands therefor are selected by the state, the secretary of the interior department of the United States will approve such selection and the claim of the state of Washington to title to such lands, including the lands here in controversy, will be relinquished. The demurrer having been sustained, this appeal was taken.

The title to lands in section 36, which at the time of the admission of the state were unsurveyed has been established in the state, although prior to the survey, patents for such lands have already been issued by the Federal government. The complaint in this action alleges that, in a suit between the state and the appellant's grantor, the title to the section here in question

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has been determined to be in the state. If there had been no such suit, as a matter of law, following the decision of this court in the case of *State v. Whitney*, 66 Wash. 473, 120 Pac. 116, the facts plead in the appellant's complaint would have been held to have established title in the state. Subsequent to the decision in the *Whitney* case, the action referred to in the complaint as having been taken by the legislature of the state and the Congress of the United States, looking to the relinquishment by the state of its title to section 36 and the acceptance of lieu lands therefor, took the form, as far as the state is concerned, in ch. 102, Laws of 1913, p. 300 (Rem. Code, §6635-1 *et seq.*), which provides in § 3 thereof:

"Whenever the title to any lands selected under the provisions of this act shall become vested in the state of Washington by the acceptance and approval of the lists of lands so selected, or other proper action of the United States . . . the state shall convey . . . the lands of the state relinquished under the provisions of this act, which deed shall convey to and vest in the United States all the right, title and interest of the state of Washington therein." Rem. Code, § 6635-3.

Under this act, title to section 36 remains in the state of Washington until all of the conditions required by the acts of the state legislature and the Congress of the United States have been performed. The complaint alleging that the final selection has not been completed, it follows that the state is still the owner of the land here in question. That being true, of course, it is not subject to taxation. The fact that the appellant may in all probability become the owner of this property by the compliance by the state and Federal governments with the terms of their agreements, does not give him title, until that title has come either in the form of a new patent from the Federal govern-

ment, or from the old patent by virtue of the relinquishment by the state of its title.

We now meet the second question presented in this case: The appellant having established by his pleading that the title is not in him, but in the state of Washington, can he complain because the county is levying taxes against property which he does not own? Were this an open question, the writer of this opinion is inclined to believe that the logical answer would be against appellant's right; but, reading the decisions of this court, the conclusion must be that it is no longer an open question. It has been held that, although taxes have been assessed against land which was the property of the state, a person having an interest in that property which might thereafter result in legal title, has a right to maintain an action looking to the cancellation of taxes, by reason of the fact that, when the title should eventuate in him, the taxes theretofore improperly assessed would have created a cloud upon his after-acquired title. We cannot distinguish the present case from the case of *Bird Timber Co. v. Snohomish County*, 81 Wash. 416, 143 Pac. 433, and especially as that case appears in the report of its rehearing in 88 Wash. 90, 152 Pac. 689, the title of the plaintiff in that action being considerably more difficult of definition than that of appellant in this case. On the strength of the *Bird* case, and the cases cited therein from this court in support of that decision, we are of the opinion that the appellant in this case had the right to prosecute this action, and that the complaint stated a cause of action. The lower court was, therefore, in error in having sustained the demurrer, and, for that reason, the action will be reversed.

MAIN, C. J., CHADWICK, MITCHELL, and TOLMAN, JJ.,
concur.

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Opinion Per HOLCOMB, J.

[No. 15014. Department Two. January 9, 1919.]

GEORGE HANCOCK, *Appellant*, v. PACIFIC COAST
ELEVATOR COMPANY, *Respondent*.¹

WAREHOUSEMEN (7)—ACTION FOR CONVERSION—TITLE—EVIDENCE.
An action for the conversion of wheat held in warehouse, must fail where plaintiff had sold all his receipts, representing all his wheat, although, due to a commingling of other wheat, a portion of it remained in the warehouse after full delivery to the purchaser; since plaintiff had no title.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered April 22, 1918, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for conversion. Affirmed.

J. W. Brooks, for appellant.

J. G. Thomas and *W. A. Toner*, for respondent.

HOLCOMB, J.—Appellant stored his 1915 crop of Turkey Red wheat in respondent's warehouse at Moore Station. It was piled in the south end of the warehouse in an L shape, in a separate pile marked with appellant's name for identification. The wheat remained in the warehouse until about November, 1916, at which time it was weighed out and delivered, excepting 164 sacks, to Jones-Scott Company, which had purchased all the warehouse receipts from appellant. During the time the wheat was in storage, the end of the warehouse fell, and a considerable quantity of the wheat also fell out, which necessitated resacking the fallen wheat. The resacking increased the number of the sacks, for the reason that some sacks contained smaller quantities of grain than originally. Some 12,000 pounds of wheat more than the warehouse receipts

¹Reported in 177 Pac. 639.

called for, and evidently wheat of other parties, was delivered to Jones-Scott Company, and appellant found that there remained 164 sacks, or 340 41/60 bushels, of his wheat, for which respondent issued and delivered to appellant a memorandum of scale weight, subsequent to the sale to Jones-Scott Company. Respondent sold this wheat with all the other wheat in the warehouse. Appellant brought action to recover \$500 for the value of the 164 sacks of wheat. The jury returned a verdict in favor of appellant for the sum of \$429.25. On motion of respondent, the court, on April 22, 1918, entered a judgment notwithstanding the verdict in favor of respondent. The entry of this judgment is assigned as error.

The evidence shows that the wheat which appellant had delivered to the respondent was sold by the appellant to the Jones-Scott Company. The appellant testified as follows:

“Q. How many bushels of wheat did you sell to the Jones-Scott Company? A. I cannot say. I sold them my wheat that I had in there, all the wheat I had in there, and I went by my receipts. Mr. Kershaw said he would take my wheat and if there was any over-weight he would take it at the same price, so it was weighed out. Q. Do you know how much more wheat they paid for than your receipts call for? A. About two hundred bushels.”

The evidence is uncontradicted that the appellant sold all his wheat, and that the Jones-Scott Company bought all the appellant's wheat in the warehouse. If any of the wheat was left in the warehouse out of the pile that appellant had delivered to the warehouse in 1915, while, of course, it would not belong to respondent, it could no longer belong to the appellant on account of the sale. All over-weight, under the sale, belonged to Jones-Scott Company, which alone

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would be liable to appellant for its value, and respondent could not be liable for its value.

Respondent had answered, alleging, and appellant proved, that Jones-Scott Company had bought appellant's 1915 crop of wheat. There being no showing that the appellant was in any way representing or succeeding the Jones-Scott Company in the action, the appellant's complaint must fail if the proof does not substantiate it. The evidence was such that the minds of reasonable men could not differ, and the judgment notwithstanding the verdict was proper. The judgment is affirmed.

MAIN, C. J., PARKER, FULLERTON, and MOUNT, JJ., concur.

[No. 15017. Department Two. January 9, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
TONY SCHIMMELS, *Appellant*.¹

LARCENY (25)—EVIDENCE—SUFFICIENCY. Evidence that, two months after sleds were stolen, they were found in a building which was in the care of the accused at the time of the offense, but not when discovered, and to which others had access is insufficient to sustain a conviction of grand larceny.

Appeal from a judgment of the superior court for Ferry county, Neal, J., entered February 21, 1918, upon a trial and conviction of grand larceny. Reversed.

Samuel Porter, for appellant.

PARKER, J.—The defendant Schimmels was charged and convicted by the verdict of a jury in the superior court for Ferry county of the crime of grand larceny,

¹Reported in 177 Pac. 685.

committed by the stealing of a pair of bobsleds. He has appealed to this court.

Counsel for appellant, by appropriate motion made at the conclusion of the state's evidence, challenged the sufficiency of the evidence to sustain a conviction, asking the court to so decide as a matter of law; and at the conclusion of all the evidence, requested the court to direct the jury to return a verdict of not guilty in his favor. The claimed error of the trial court in refusing to so rule is the only question we find it necessary to here notice.

Appellant was charged with stealing the sleds on November 4, 1917, from near a blacksmith shop in the town of Republic. The sleds were last seen there several days previous to that date. About two months thereafter, in January, 1918, the sleds were found in one of the buildings of the Mountain Lion Mining Plant, situated about four miles from Republic. This plant had not been in operation for several years prior to that time, and appellant was the caretaker of the buildings, some of which were locked, appellant or his wife having the keys. They lived within about a quarter of a mile of the plant. One of the doors on the building in which the sleds were found had a lock which could be unlocked by almost any skeleton key, or even by a bent wire, as one witness testified. The caretaking of these buildings did not involve the constant presence of a caretaker. Appellant was often away at work at Republic and elsewhere, procuring and furnishing wood for fuel for others. About the middle of November he went to Idaho to work, and was away until near the middle of January, a short time after the sleds had been found in the building. He was arrested upon his return home. He swore positively that he had no knowledge of the sleds being

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in the building, that he never had possession of them and did not steal them. There is undisputed testimony of another apparently credible witness that the sleds were not in the building when appellant went away in November. This witness appears to have had occasion to see the inside of the building and examine it with some care, under such circumstances that he would have seen the sleds had they been there, just before appellant went to Idaho in November. There was at least one other person besides appellant and his wife who occasionally had access to the building and occasionally borrowed the key for that purpose. One witness testified that he saw appellant's team standing near the blacksmith shop where the sleds were last seen, one evening a few days before they were missed; but this place was where many teams were left standing from time to time by their owners. Indeed, it seems to have been treated as a sort of public place for that purpose. This, we think, is in substance the whole of the evidence, worthy of serious consideration, which can be said to in any measure point to the guilt of appellant.

That the sleds were stolen may be conceded; but we think there is nothing for appellant's conviction to rest upon, other than the fact that the sleds were found in the building two months after they were stolen and almost the same time after appellant had gone to Idaho, which building was not in the control of appellant when the sleds were found therein, and was not exclusively accessible to him before going to Idaho, even at and after the time the sleds were missed and supposed to have been stolen. As to appellant's team being seen near the place where the sleds were missed a few days before they were missed, such fact proves nothing whatever as against him, in view of

the conceded fact that many other teams were left standing at that place from time to time, as was the custom of people driving to town to trade. We are of the opinion that appellant's conviction cannot be allowed to stand upon this evidence, and that the trial court erred in refusing to instruct the jury to find him not guilty. It was not such an exclusive recent possession of stolen property as will, standing alone, support a conviction. *Calloway v. State*, 111 Ga. 832, 36 S. E. 63; *State v. Belcher*, 136 Mo. 135, 37 S. W. 800; *White v. State*, 72 Ala. 195; *Watts v. People*, 204 Ill. 233, 68 N. E. 563; *Porter v. State*, 45 Tex. Cr. 66, 73 S. W. 1053; 25 Cyc. 139, 140; 17 R. C. L. 71-73.

The judgment is reversed, and the trial court directed to discharge the appellant.

MAIN, C. J., MOUNT, and HOLCOMB, JJ., concur.

[No. 15055. Department Two. January 9, 1919.]

ETERNAL TRUTH SPIRITUALIST CHURCH OF AMERICA,
Respondent, v. JOSEPH STUBER *et al.*, Appellants.¹

RELIGIOUS SOCIETIES (5)—CONTROL—ACTIONS—INJUNCTION. A temporary injunction, pending determination of the merits of an action between rival church factions, is properly granted where plaintiff trustees were in possession and conducting the business of the church much as had been done, and restraint was necessary to prevent loss of corporate functions and property.

Appeal from an order of the superior court for King county, Ronald, J., entered May 10, 1918, granting a temporary injunction, after a hearing before the court upon affidavits. Affirmed.

Edgar C. Snyder, for appellants.

George A. Custer and *Frank E. James*, for respondent.

¹Reported in 177 Pac. 686.

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Opinion Per FULLERTON, J.

FULLERTON, J.—The respondent, plaintiff below, is a religious society, duly incorporated under the laws of the state of Washington. Its by-laws provide for certain officers, and a governing body consisting of five trustees. By some means, not made altogether clear by the record, it has developed two sets of trustees, each set claiming to be the *de jure* as well as the *de facto* trustees of the corporation, entitled to possession of its property and entitled to exercise and control its corporate functions. On April 6, 1918, the appellants in the present action, purporting to act as trustees of the corporation, entered an order removing from office the pastor of the church, and on the next day entered a similar order removing the treasurer. On the refusal of these officers to recognize the authority of the board, that body, purporting to act for and on behalf of the corporation, brought an action seeking to restrain them from exercising any of the duties pertaining to the offices of pastor and treasurer. Immediately thereafter, the rival board of trustees, in the name of the corporation, instituted the present action. In the complaint it is alleged that the defendants are usurping the offices of trustees of the corporation, and attempting to conduct and carry on its business and control its property and assets without legal authority or right. The prayer was for injunctive relief. On the filing of the complaint, an application was made for a temporary injunction pending the hearing of the cause upon its merits. The application was duly noted for hearing, at which hearing the rival board appeared, and both sides submitted the controversy to the court on affidavits in which the claims of the rival contestants are set forth in more or less detail. The trial court granted a temporary injunc-

tion, and from the order entered evidencing its ruling, this appeal is prosecuted.

The sole question presented here is the sufficiency of the evidence to warrant the relief granted. The appellants concede that, in this jurisdiction, the power of the court to grant a temporary injunction is more or less discretionary, but contend that the discretion is not arbitrary or unlimited and must be exercised reasonably, else the order is subject to correction for manifest abuse, and insist that there was here such manifest abuse. But conceding the correctness of the rule contended for, and giving full effect to the language of the cases cited in support thereof, we cannot conclude from the record before us that the court in making the order complained of exceeded its legitimate powers. It is needless to detail the evidence. It is sufficient to say that the quarrel between the rival factions has engendered the bitterness usual in such cases, and that the witnesses are widely divergent on almost every essential fact. But the evidence clearly shows that the respondent faction is in possession of the hall where the services of the church are held, are in possession of the church's records and property, are conducting the business of the church, in so far as they have been permitted so to do by the appellants, much as it was wont to be conducted before the present difficulty arose, and that to leave the parties unrestrained may result in the nullification, for the time being, at least, of the corporation's functions and powers, as well as a loss of its corporate property. These facts, we think, justify the ruling of the trial court.

The question of the ultimate rights of the parties was not before the trial court and is not before us, and is not, of course, hereby determined; these mat-

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Opinion Per MACKINTOSH, J.

ters will be fully met at the hearing upon the merits. We but hold that the trial court did well in declaring an armistice in which hostilities shall be suspended until final peace shall be restored by a judgment upon the merits of the controversy.

Order affirmed.

MAIN, C. J., MOUNT, PARKER, and HOLCOMB, JJ., concur.

[No. 15057. Department One. January 9, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
JOHN SIEBENBAUM, *Appellant*.¹

CRIMINAL LAW (255)—INSTRUCTIONS—COMMENTS ON FACTS—CREDIBILITY OF WITNESSES. It is unlawful comment upon the evidence in an action for violation of the state-wide prohibition law, for the court to instruct the jury that the act provides for the activity of citizens other than officers and that it is the duty of any citizen to detect crime, where the only evidence to sustain conviction was that of two detectives who had by deceit and subterfuge induced defendant to violate the law, and the court's purpose clearly was to bolster up the state's witnesses.

Appeal from a judgment of the superior court for Jefferson county, Pemberton, J., entered September 13, 1917, upon a trial and conviction of violating the state prohibition law. Reversed.

A. R. Coleman, for appellant.

Tom W. Holman, for respondent.

MACKINTOSH, J.—The defendant was convicted of a violation of the state prohibition act, the testimony against him being confined entirely to that of two men who had been employed by the county for the purpose of procuring evidence in this and similar cases.

¹Reported in 177 Pac. 669.

These witnesses admitted upon the stand that, true to the tradition of their calling, they had operated under assumed names, had, by deceit and subterfuge, attempted to induce the defendant to violate the law, and, after several days of unsuccessful effort, had finally succeeded in persuading him to such a violation. All of the state's evidence having come from such sources, it was apparent that defendant's counsel, in argument to the jury, would refer in rather an uncomplimentary way to the state's witnesses; and the court, as is said in respondent's brief, for the purpose of guarding against the jury's being misled by this false issue, gave the following instruction:

"You are instructed that chapter 2 of the 1915 session laws of the state of Washington contemplates and provides for activity by citizens of the state of Washington, independently of the state and county officers, in suppressing illicit sale of intoxicating liquor. It is the right of any citizen of the state of Washington to detect crime and obtain evidence."

This instruction might be proper in certain cases, but in this case, in which the only evidence was that which we have referred to, this instruction could only have been given in reference to that evidence, and was clearly an attempt to bolster up the state's witnesses and render ineffectual the anticipated argument of counsel upon their credibility. We are confirmed in this opinion by the statement contained in respondent's brief:

"It was not given as respecting the testimony of the state's witnesses—who were in fact hired by the sheriff and paid by the county—but was given to thwart any unfair consideration by the jury of the claims of counsel."

As long as it is necessary to set a thief to catch a thief, witnesses such as those presented in this case

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probably fill a place in the world's economy, but when they are placed upon the stand under our constitution prohibiting the comment by the court upon the evidence, the judge is forbidden to give to the jury the cautionary instruction which his natural abhorrence of the class would dictate. *State v. Smith*, 103 Wash. 267, 174 Pac. 9; *State v. Palmer*, 104 Wash. 396, 176 Pac. 547. So, also, must the judge, who is inspired with the spirit of the prosecution, desist from attempting, by using fair words for ugly things, to impress the jury with the advisability of returning what he considers a righteous verdict. The jury is the sole judge of the credibility of the witnesses, and the assistance which it may need in determining that credibility will be amply furnished by counsel. It is true that it is always open season for the bootleggers, and they may be shot from blinds, decoyed by stool pigeons, hunted with hounds, and taken in traps; yet the bag is subject to a fair and impartial examination before a jury, even though thereby it result that an occasional bird may escape.

Judgment reversed.

MAIN, C. J., TOLMAN, CHADWICK, and MITCHELL, JJ.,
concur.

[No. 15104. Department One. January 9, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
NOAH O. HOYER, *Appellant*.¹

HOMICIDE (5, 6)—MANSLAUGHTER—ELEMENTS—KILLING WITH DESIGN—STATUTES. Under Rem. Code, §§ 2392-2395, defining murder in the first degree as the killing with premeditated design to effect the death of the person killed, murder in the second degree as the killing with such design but without premeditation, and manslaughter as every other killing not excusable or justifiable, killing with a design to effect death is murder and the element of manslaughter is excluded, even if under provocation or sudden heat of passion.

HOMICIDE (111)—INSTRUCTIONS—SELF-DEFENSE. Upon an issue as to self-defense, an instruction that before the killing there must have been some overt act of the person killed, is not erroneous in failing to use the words "assault with the naked fist," where there was no dispute as to the deceased's having used his hands only in the immediately preceding encounter, in view of proper following instructions from which the jury could not have been misled by the words "overt act."

SAME (111). In a prosecution for murder where there was evidence that accused armed himself and then provoked an attack and shot the deceased, it is proper to instruct that the right of self-defense is allowed as a shield and not a sword, and that a person must act honestly and not provoke an attack as an excuse for killing.

SAME (38)—EVIDENCE—ADMISSIBILITY—PREVIOUS QUARRELS. In a prosecution for murder, evidence as to the details of previous quarrels and ill-feeling is admissible to show motive.

Appeal from a judgment of the superior court for Pend Oreille county, Carey, J., entered January 19, 1918, upon a trial and conviction of murder. Affirmed.

E. L. Sheldon and *L. C. Jesseph*, for appellant.

Chas. H. Leavy, for respondent.

TOLMAN, J.—This is an appeal from a conviction of murder in the first degree; and error is assigned be-

¹Reported in 177 Pac. 683.

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Opinion Per TOLMAN, J.

cause of instructions to the jury given and refused by the trial court, the refusal to grant a new trial, and the admission of evidence as to the details of the quarrels between appellant and deceased which preceded the homicide.

The first and principal contention is that the trial court, in his instructions, defined the voluntary killing of another upon sudden heat as murder in the second degree instead of manslaughter. We have so recently fully considered and passed upon this identical question in *State v. Palmer*, 104 Wash. 396, 176 Pac. 547, that it seems wholly unnecessary to again enter into a discussion of the question; and since the instruction given by the court upon this subject is entirely in harmony with our views as expressed in the *Palmer* case, the matter need not be further treated.

The appellant sought to justify the homicide upon the ground that it was committed in self-defense, and, as is usual in cases of this kind, the evidence was conflicting. The state's evidence tended to show a series of quarrels between appellant and the deceased produced mainly by jealousy, resulting in a number of personal encounters, followed by numerous threats on the part of appellant to kill the deceased; and also it was the theory of the state, and its evidence tended to show, that the final quarrel was instigated by appellant at a time when he was armed, in order that he might carry out his design to kill under conditions which would furnish evidence that he acted in self-defense. The appellant's evidence, on the other hand, tended to show that the deceased, who was a very much larger and stronger man than he, had for a number of years, for little or no cause or reason, followed the practice of beating or knocking him down at frequent intervals; that appellant had learned by ex-

perience that he was no match physically for deceased; that he did not seek the quarrel which ended in the tragedy, or any of the quarrels, but that each and all of them were forced upon him by the deceased, and in the final encounter, after having used his best efforts unavailingly to escape, he drew the revolver, which he had carried for some days in his coat pocket, as he says for the purpose of killing cats which molested his chickens, and believing himself in imminent danger of great personal injury, he fired the shot which caused the death of his assailant. This evidence called for an instruction as to the law of self-defense, and the court gave an instruction which very fully covers the subject. Appellant's proposed instruction upon the law of self-defense was refused, and this giving and refusing is complained of.

The instruction given by the court fairly stated the law and, as a whole, was fully as favorable to appellant as the one refused. The only material differences between the two instructions are: First: The instruction given does not in terms use the words "assault with the naked fist," in describing the act on the part of the person killed, but instead says: "There must be, or reasonably appear to be, at or immediately before the killing, some overt act of the person killed, etc." Since there is no dispute in the testimony as to the deceased having used his hands, and his hands only, in the encounter which immediately preceded the killing, the expression used and the one refused necessarily mean the same thing in this particular case; and the jury having been properly instructed that if appellant had reasonable cause to believe, and did believe, that deceased was about to inflict upon him great personal injury, or take his life, the killing would be justifiable, could not have misunderstood what was meant by the words "overt act."

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Second: To the instruction given was appended a paragraph not included in the instruction refused, which reads:

“The right of self-defense is allowed to every person, as a shield and not as a sword, and in the exercise of this right a person must act honestly and in good faith. A person when assaulted may exercise a reasonable force to repel an attack, but must not provoke an attack in order that he may have an apparent excuse for killing his adversary.”

Since it was the theory of the state that appellant armed himself and then provoked the attack, and there was evidence to support that theory, this instruction was properly given. *State v. Hawkins*, 89 Wash. 449, 154 Pac. 827.

Nor do we find any error in the admission of testimony as to the details of the quarrels which preceded the homicide. Evidence of previous quarrels and ill-feeling is admissible to show motive. *State v. Churchill*, 52 Wash. 210, 100 Pac. 309; 21 Cyc. 915; 13 R. C. L. 910.

We find no error in the record, and the judgment is therefore affirmed.

MAIN, C. J., MACKINTOSH, MITCHELL, and CHADWICK, JJ., concur.

[No. 15137. Department Two. January 9, 1919.]

ANGUS J. OLIVER *et al.*, *Appellants*, v. ALEX POLSON
et al., *Respondents*.¹

APPEAL (48)—DECISIONS REVIEWABLE—FINALITY—ELECTION BETWEEN CAUSES. An order requiring plaintiff to elect between two causes of action, separately stated, is not appealable, since it does not determine the action or prevent final judgment, and may be reviewed after final judgment, either upon a dismissal of the cause not tried embodied in the final judgment; or under Rem. Code, § 1716, subd. 2, authorizing the review of any order made in the same action on appeal from a final judgment.

Appeal from an order of the superior court for King county, Frater, J., entered September 24, 1918, requiring an election between causes of action in plaintiff's complaint. Dismissed.

Edwin H. Flick, for appellants.

Kerr & McCord and *Stephen V. Carey*, for respondents.

MAIN, C. J.—This is an appeal from an order of the superior court requiring the plaintiffs to elect which of two causes of action they would go to trial upon. The amended complaint, which will be referred to as the complaint, contains two causes of action, separately stated. The defendants, believing that these two causes of action were inconsistent, moved the superior court to require the plaintiffs to elect upon which of them they would proceed to trial. This motion was sustained, and an order entered requiring an election. From this order, the plaintiffs appeal.

The respondents move to dismiss the appeal on the ground that the order is not an appealable one. If the order is appealable, it must be by reason of Rem.

¹Reported in 177 Pac. 678.

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Opinion Per MAIN, C. J.

Code, § 1716, subd. 6. Under that statute an order to be appealable must, in effect, determine the action and prevent a final judgment, or it must discontinue the action. In *Vaktaren Pub. Co. v. Pacific Tribune Pub. Co.*, 41 Wash. 355, 83 Pac. 426, it was held that an order striking a complaint from the files for the reason that it contained two or more causes of action which were not separately stated was not a final order, and was therefore not appealable. In *Virtue v. Stanley*, 79 Wash. 87, 139 Pac. 764, it was held that an appeal would not lie from an order requiring the defendant to elect between two inconsistent affirmative defenses, since such an order was merely interlocutory and did not determine the action or prevent a final judgment. While the analogy between those cases and the present is not perfect, yet it would seem that the same rule should be applied to the present case. The order complained of does not determine the action or prevent a final judgment. Neither does it discontinue the action.

It does not follow from this, however, that the appellants are deprived of the right to have the order reviewed when a final judgment shall have been entered. If the appellants should decline to elect, as required by the order, and allow a judgment of dismissal to be taken against them, they could appeal from that judgment. But this is not their only remedy. If, after making an election, a judgment of dismissal should be entered by the trial court as to the cause of action upon which the appellants did not elect to proceed to trial, an appeal could be prosecuted from that judgment. When a cause comes to this court based upon two causes of action, separately stated, and the record or the special findings of the jury are such that the two can be segregated, the court will

affirm as to one and reverse as to the other, if this be in accord with the law and the facts. *Auwater v. Kroll*, 79 Wash. 179, 140 Pac. 326. Likewise, it would seem that there would be no legal impediment to the superior court entering a judgment of dismissal as to one cause of action, and the cause proceed to trial upon the other. If a judgment should not be entered in either one of the manners just specified, a judgment of dismissal as to the cause of action upon which appellants elected not to proceed could be embodied in the final judgment in the cause, after a trial upon the merits upon the cause of action which they elected to have tried, and an appeal could be prosecuted from this judgment, which would bring to this court for review the order requiring appellants to elect. In subd. 2 of § 1716, Rem. Code, it is provided that an appeal from a final judgment entered in an action "shall also bring up for review any order made in the same action or proceeding either before or after the judgment," in case the record sent up on appeal shall show such order sufficiently for the purpose of a review thereof.

It follows that the appeal must be dismissed, and it is so ordered.

FULLERTON, PARKER, MOUNT, and HOLCOMB, JJ., concur.

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Opinion Per PARKER, J.

[No. 15152. Department Two. January 9, 1919.]

THE STATE OF WASHINGTON, *on the Relation of*
Edgar M. Swan, Plaintiff, v. THE SUPERIOR
COURT FOR CLARKE COUNTY, *R. H. Back,*
*Judge, Respondent.*¹

MANDAMUS (70)—JURISDICTION—APPELLATE COURTS—AMOUNT IN CONTROVERSY. In view of Constitution, art. 4, § 4, limiting the appellate jurisdiction of the supreme court, mandamus does not lie to compel the superior court to dismiss an action at law for the recovery of money where the original amount in controversy was less than \$200.

Application filed in the supreme court December 2, 1918, for a writ of mandate to compel the superior court for Clarke county, Back, J., to dismiss an action. Denied.

Henry Crass and Edgar M. Swan, for relator.

Geo. B. Simpson, for respondent.

PARKER, J.—The relator, Swan, seeks a writ of mandamus from this court to compel the superior court for Clarke county to dismiss an action pending therein, wherein C. McIrvin is plaintiff and the relator is defendant. The dismissal was asked in that court upon the ground that settlement of the controversy had been made between McIrvin and the relator, and proper written evidence thereof filed in the action. The superior court denied the application for dismissal, apparently on the ground that McIrvin's assignor of the claim sued upon had some rights involved in the action which would be prejudiced by the dismissal. The action is a pure law action for the recovery of money only, and does not involve "the legality of a tax, impost, assessment, toll, municipal fine, or the validity

¹Reported in 177 Pac. 679.

of a statute;" the original amount in controversy and sought to be recovered being only \$125.

It seems quite plain to us, under our constitutional limitation upon the jurisdiction of this court, and the settled law of this state, that we have no jurisdiction to issue a writ as prayed for. Section 4, art. 4, of our constitution, defining the appellate jurisdiction of this court, reads as follows:

"Its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute."

Plainly the relator is here seeking to have us review a ruling of the superior court made in an action which is not appealable to this court; that is, a ruling made in an action by a court which is the court of last resort, in so far as that action is concerned. If the ruling of the superior court can be reviewed in this court by mandamus, prohibition, or certiorari, then the constitutional limitation upon this court's appellate jurisdiction would be rendered of no practical effect. It seems to us that to review alleged errors of the superior court in such cases is but to exercise appellate jurisdiction, regardless of whether the proceeding bringing the question into this court for review may be called appeal, mandamus, prohibition, or certiorari. In *State ex rel. Prentice v. Superior Court*, 86 Wash. 90, 149 Pac. 321, Judge Ellis, speaking for the court, well stated the law as follows:

"This court has also held that, when the amount involved is less than \$200, and the case does not fall within any of the exceptions to the limitation of our jurisdiction to cases in excess of that amount con-

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tained in art. 4, § 4, of the constitution, the extraordinary remedies of prohibition and mandamus will not lie, either to prohibit the superior court from assuming jurisdiction when it has none, or to compel the superior court to exercise a jurisdiction which it has. This on the ground that the jurisdiction of this court in the issuance of the writs of mandamus and prohibition must be construed as subject to the same constitutional limitation as in other cases where the amount in controversy is less than \$200. From the nature of the remedies, prohibition is the counterpart of mandamus, and the same rule must therefore apply to both. *State ex rel. Fuller v. Superior Court*, 31 Wash. 96, 71 Pac. 722; *State ex rel. Cleek v. Tallman*, 38 Wash. 132, 80 Pac. 272; *State ex rel. McIntyre v. Superior Court*, 21 Wash. 108, 57 Pac. 352; *State ex rel. Wallace v. Superior Court*, 24 Wash. 605, 64 Pac. 778; *State ex rel. Plaisie v. Cole*, 40 Wash. 474, 82 Pac. 749; *State ex rel. Ide v. Coon*, 40 Wash. 682, 82 Pac. 993."

In *State ex rel. Rutter v. Superior Court*, 91 Wash. 304, 157 Pac. 684, involving an attempted review by certiorari of a ruling of a superior court, which was not appealable because it was not final, we said:

"If parties can by this writ obtain review in this court of alleged errors in the making of interlocutory orders not appealable, then the limitation of the statute upon the right of appeal from orders other than final judgments would be of no practical effect and the evils of reviewing interlocutory orders prior to final judgment would not be prevented. It seems plain to us that the very fact that this order is not appealable prevents our reviewing the alleged error in the making of it, other than by appeal from the final judgment to be rendered in the action."

And so here, the very fact that no order or final judgment rendered in the action here involved is appealable to this court, prevents our reviewing, by mandamus or any other procedure, any ruling or judgment of the court made therein.

This court's jurisdiction has not been challenged by counsel resisting the relator's application, but since we have no jurisdiction over the subject-matter, we feel constrained to decline jurisdiction, of our own motion.

The writ is denied.

MAIN, C. J., MOUNT, HOLCOMB, and FULLERTON, JJ., concur.

[No. 14672. Department One. January 10, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
WILLIAM VANE, *Appellant*.¹

CRIMINAL LAW (434)—APPEAL—REVIEW—DISCRETION—CHANGE OF VENUE. The denial of a motion for change of venue on the ground of local prejudice will not be disturbed in the absence of an abuse of discretion, notwithstanding the accused was compelled to go to trial with two jurors who had made affidavits in resistance of the motion for change of venue.

PERJURY (4)—INFORMATION—MATERIALITY OF EVIDENCE. An information for perjury sufficiently charges the materiality of the testimony, within Rem. Code, § 2351, defining perjury, even if insufficient at common law, where it alleges that accused wilfully testified falsely "to the following material facts in the case," setting forth the testimony; in view of Rem. Code, §§ 2065, 2066, providing for charging a crime in ordinary language, and that no information shall be deemed insufficient when it clearly indicates the offense and the person charged.

CRIMINAL LAW (385)—APPEAL—OBJECTIONS TO INFORMATION. Matters going to the definiteness or certainty of a charge which might have been cured by amendment cannot be raised for the first time on appeal.

SAME (316)—TRIAL—INSTRUCTIONS ALREADY GIVEN. It is not error to refuse requested instructions that are covered in the general charge.

PERJURY (7)—INSTRUCTIONS—MATERIALITY OF EVIDENCE. In a prosecution for perjury the determination of the materiality of the evidence is not left to the jury by the giving of an instruction that

¹Reported in 177 Pac. 728.

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Opinion Per CHADWICK, J.

the jury must find that all material allegations of the information have been proven beyond a reasonable doubt, where the jury were told that the matters charged in the information were all material matters in the case in question.

SAME (7)—INSTRUCTIONS—CORROBORATION. In a prosecution for perjury, an instruction upon the subject of corroboration of the defendant is not called for, where the testimony was admitted and the claim made that it was given under an honest mistake.

SAME (6)—EVIDENCE—SUFFICIENCY. In a prosecution for perjury, where the only issue was as to whether defendant was honestly mistaken, a conviction is sustained, where the authenticity of corroborating evidence as to dates offered by the defendant was successfully challenged by the state.

Appeal from a judgment of the superior court for Pend Oreille county, Neal, J., entered April 30, 1917, upon a trial and conviction of perjury. Affirmed.

R. L. Edmiston and E. L. Sheldon, for appellant.

Chas. H. Leavy, for respondent.

CHADWICK, J.—One Carl Brink was put to trial in Pend Oreille county in December, 1916. He was charged with the crime of horse stealing. He entered a plea of not guilty. The horses had been sold at Hill-yard, in Spokane county, on the 20th day of June. The defense was an alibi, and the whereabouts of Brink on the 20th of June became the material question in the case.

Defendant Vane and Brink had been friends for about fifteen years, having neighbored together in a way customary in new countries. Both had taken up homesteads. Defendant had prospered and had helped Brink, who had accomplished but little in a financial way, by advancing money from time to time. He had both a financial and a personal interest in Brink. When Brink was arrested he went on his bond, procured counsel, and interested himself actively in finding testimony to sustain the asserted alibi. After the

purchaser of the horses had identified Brink and had testified that he purchased the horses on the 20th day of June, which fact was further evidenced by a bill of sale and a check drawn to pay the purchase price, defendant went upon the stand and swore to a set of circumstances, and in precise detail, accounting for the whereabouts of Brink during the whole of the 20th day of June; the gist of his testimony being that Brink and his wife had come to his house at Newport, Washington, in a rowboat belonging to defendant, arriving at about 11 o'clock; that they had lunch at his home; that the Brinks needed some groceries; that he took Brink and one Mottner in his car and went to a grocery store and purchased the groceries for Brink; that, while he was away, Mrs. Brink paid Mrs. Vane \$200 for taxes on the Brink homestead, upon which defendant held a mortgage; and that he had not received any of the proceeds of the sale of the horses. Defendant brought the sales slips from the grocery store, from a garage where he had bought gasoline, and a receipt for the \$200, all of which bore the date of June 20, as evidence to corroborate his testimony.

After defendant had testified, and pending an adjournment of the court until the next day, Brink made written confession of his guilt, saying that he had left Newport in the night of June 19, had gone to Hillyard, where he had sold the team, and returned to Newport on the morning of the 21st of June.

Defendant was arrested and charged with the crime of perjury. The information upon which he was put to trial contains four counts. He was found guilty, and brings the case here, assigning many errors.

A motion was made for a change of venue upon the ground of prejudice. Several affidavits were filed by

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defendant, and a greater number were filed by the state. We are not prepared to hold, upon the showing made, that the trial judge abused the discretion which the law puts upon him when passing upon a question of this kind. It is not made to appear that any unusual difficulty was experienced in obtaining a jury, which, after all, is the best test of prejudice. But counsel says that defendant, having exhausted his peremptory challenge, was forced to go to trial with two jurors in the panel who had made affidavits in resistance of the showing made in support of the motion for a change of venue. The prosecuting attorney asserts that defendant might have exercised peremptory challenges against the jurors complained of if he had desired to do so. The examination of the jurors is not made a part of the record and we have no way of settling the dispute, except to pass it under the presumption that, notwithstanding the two jurors made affidavit that defendant could have a fair trial, they qualified to the satisfaction of the trial judge.

Defendant complains that the information is insufficient in form and substance to sustain a conviction, in that it does not charge the materiality of the alleged perjurious testimony.

After reciting the history of the Brink trial, the information continues:

"That, after the said William Vane, defendant herein, was duly sworn in said cause, as aforesaid, he, the said William Vane, did then and there in said action, as aforesaid, unlawfully, feloniously, wilfully, knowingly and intentionally testify, declare and swear as true, when in fact, he, the said William Vane, defendant herein, then and there well knew said facts to be false and untrue, the following *material matter* in substance and in fact, in the cause aforesaid, as follows, to wit:"

The testimony alleged to be false is here set out, and the information continues:

“That in truth and in fact, the said Carl Brink, defendant in said action, then and there being tried, as aforesaid, was at all times on June 20th, 1916, in Spokane county, in the state of Washington, and that the said Carl Brink had with him then and there a team stolen from Cunningham Brothers, of Pend Oreille county, Washington, and that he, the said Carl Brink, did on said 20th day of June, 1916, in the county of Spokane, sell and dispose of said team of horses, and that said defendant herein, William Vane, knew of said facts at the time he gave said false and perjured evidence as above quoted.”

If we gather counsel's theory, it is that the information should charge, in that part following the quotation of the testimony alleged to be false, that the evidence became material at the trial, and the reasons why it was material. With the exception of the testimony relied on to support the charge, each count is in the same language. Counsel cite: *State v. Guse*, 21 Wash. 269, 57 Pac. 831; *State v. See*, 4 Wash. 344, 30 Pac. 327, 746; *State v. McLain*, 43 Wash. 124, 86 Pac. 388; 16 Ency. Plead. & Prac., 342; 30 Cyc. 1433.

The statute, Rem. Code, § 2351, being the Criminal Code of 1909, provides that:

“Every person who, in any action, . . . shall swear that he will testify . . . truly . . . and who, in such action . . . shall state . . . as true any material matter which he knows to be false, shall be guilty of perjury.”

The materiality of the testimony is the first essential of a charge of perjury, and it may be that the information would not meet the tests of the common law, but we have endeavored to relax the rigidity of those rules. When fair trials were the exception rather than the rule, it was but natural that judges,

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having a sense of right and humanity, should hold the state to strict pleading and to a stricter proof; but in these times, when those charged with crime are protected by every constitutional and statutory guaranty of a fair trial that a sense of humanity can suggest, and by a general sentiment that no innocent man shall be convicted of crime—when education is general, and understanding of written words is common to all classes, there is no sound reason why the rigorous rule of the common law should be adhered to as a rule of construction in criminal pleadings. In evident recognition of the fact that courts are tangled in precedent and too often meet changed conditions in sloth and travail, the legislature has wisely provided,

“That the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.” Rem. Code, § 2065, subd. 6. And

“No indictment or information is insufficient, for any surplusage or repugnant allegation, or for any repetition, when there is sufficient matter alleged to indicate clearly the offense and the person charged.” Rem. Code, § 2066, subd. 4.

The spirit of these statutes has been ably interpreted by the writer of the opinion in *State v. Wright*, 9 Wash. 96, 37 Pac. 313.

When tested by the statute, as we may say of jeofails, we have no doubt of the sufficiency of the information. It charges that defendant falsely, knowingly, and wilfully testified as true, when, in truth, “he well knew said facts to be false and untrue, the following material facts in the cause aforesaid, to wit:” And after the testimony is set out, the facts showing the falsity of the testimony are charged. Surely defendant, being a person of common under-

standing, knew the nature and the character of the charge.

Other objections are made to the information, but they are not now available to defendant. The information was not attacked by motion or demurrer in the lower court, nor did defendant move in arrest of judgment. Matters going to the definiteness or certainty of the charge, as well as all matters of form which might have been cured by amendment, cannot be raised for the first time in this court. *State v. Blanchard*, 11 Wash. 116, 39 Pac. 377; *State v. Bodeckar*, 11 Wash. 417, 39 Pac. 645; *State v. Phillips*, 65 Wash. 324, 118 Pac. 43; *State v. McBride*, 72 Wash. 390, 130 Pac. 486; *State v. George*, 79 Wash. 262, 140 Pac. 337.

Many assignments of error are predicated upon the instructions given and instructions refused. We cannot review all of them in detail. It is enough to say that the instructions as given fairly state the law. Some of the instructions requested might well have been given, but the rules sought to be established were covered by the instructions given, and no prejudice came to defendant. We shall refer then to but two assignments.

It is complained that the court left it to the jury to determine what were the material allegations of the information, meaning, as we believe, that the court left it to the jury to determine what were the material facts in the case of *State v. Brink*. But this conclusion does not logically follow the instruction of the court that it must find that all of the material allegations of the information had been proven beyond a reasonable doubt. In this instruction the court had reference to the material allegations of the information in this case. The court told the jury that the matters charged in the information were all material

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matters to the issue in the Brink case. The jury were not left to speculate or determine these questions "judicially." Counsel's error lies in the fact that they have not marked the difference between the material allegations to be proved as facts in this case, and the material issues in the Brink case, which, of course, the court must, and did, determine judicially.

Counsel requested an instruction on corroboration. 30 Cyc. 1453. The instruction as requested went further than the law as defined by this court would warrant. *State v. Rutledge*, 37 Wash. 523, 79 Pac. 1123. But the instruction was refused for the sounder reason that the giving of the testimony which is alleged to be false was admitted at the trial. Defendant affirms all that he testified to in the Brink case, but says that he was mistaken. No corroboration was called for, and testimony on that line should have been rejected as immaterial if offered.

The only issue was whether defendant wilfully testified falsely as to the matters charged in the information, or whether he was honestly mistaken when he fixed the time and circumstances tending to support the alibi as occurring on June 20, instead of June 21, as he now maintains. The authenticity of the dates occurring on the written memoranda was successfully challenged by the state, and although the sufficiency of the facts to sustain a verdict upon each and all of the counts in the information is challenged, there was much positive evidence to sustain the state's case, and it is not for us to say that the jury should have rejected it as discredited, or as prompted by motives of revenge.

We are invited to weigh the testimony in the light of defendant's standing as a citizen. This seems to have been that of a man prominent in the affairs of the community, a fact which undoubtedly increases the

odium of a conviction on a charge so heinous as that before us. But, at the impartial tribunal of justice, the question is not whether the mighty are likely to fall, but have the mighty indeed fallen; a question of fact and not of law. Its answer is to be found in the conscience of the jury as it is reflected in the verdict, for the law takes no account of the standing or position of one charged with crime. For its own security, as well as the security of the state, those of high degree and those of low degree must answer at the same bar, and if the jury cannot save a man for what he has been, his hope is gone, for neither can the court. A Socrates may question the decision of his judges, but never the right of the tribunal to summon him to make his defense.

Affirmed.

MAIN, C. J., TOLMAN, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 14774. Department Two. January 10, 1919.]

THOMAS J. HINES, *Appellant*, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Respondent*.¹

RAILROADS (66)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—DUTY TO LOOK AND LISTEN. Plaintiff was not guilty of contributory negligence, as a matter of law, in driving an automobile upon a country railroad crossing, upon a dark night, when he was struck by a locomotive running rapidly backwards without the usual headlight or any warning signals, where he looked before driving on the crossing for an approaching train, and saw none; the negligence of the company being largely responsible for his conduct.

Appeal from a judgment of the superior court for King county, Frater, J., entered October 19, 1917, in favor of the defendant, notwithstanding the verdict of

¹Reported in 177 Pac. 795.

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a jury rendered in favor of the plaintiff, in an action for personal injuries sustained at a railroad crossing. Reversed.

S. A. Keenan, for appellant.

Geo. W. Korte and Farrell, Kane & Stratton, for respondent.

PARKER, J.—The plaintiff, Hines, commenced this action, seeking recovery of damages from the defendant railway company for personal injuries claimed to have been caused by the negligent operation of one of its locomotives at a country road crossing on its main line track some two miles east of the town of Renton, in King county. Trial in the superior court for that county sitting with a jury resulted in a verdict awarding to the plaintiff damages in the sum of \$3,000. Thereafter, before the entry of judgment upon the verdict, counsel for the defendant made a motion for judgment in its favor notwithstanding the verdict, which motion was by the court granted and judgment entered accordingly. The motion was rested upon the ground that the plaintiff's injuries were conclusively shown by the evidence to have been caused by his own contributory negligence; and it is apparent that the trial court so concluded and decided, as a matter of law, in rendering judgment notwithstanding the verdict. From this disposition of the cause, the plaintiff has appealed to this court, asking reversal of the judgment and that the trial court be directed to enter a judgment in his favor upon the verdict.

There is almost no dispute as to the facts which it is necessary for us to notice, other than as to the number and kinds of lights upon the locomotive and as to the ringing of its bell and blowing of its whistle as it approached the crossing. We shall assume that,

at the crossing, respondent's track runs east and west. This is approximately true. The country road, which crosses the track at this point, runs parallel with and adjoins the north line of the track right of way for a distance of a mile or more to the west of the crossing, while it runs parallel with and adjoins the south line of the track right of way for a distance of a mile or more east of the crossing. The track is upon a fill some six or eight feet above the road at the points where it turns at the edge of the right of way on each side thereof to the crossing. The right of way is a hundred feet wide, and the road crosses it at grade at an angle of about twenty degrees from a right angle, so that, from the turn of the road on each side of the right of way towards the track, it is about sixty-five feet from the track. From these points it ascends to the track at about a twelve per cent grade. The roadway is comparatively narrow at the crossing, and one driving a vehicle up the grade from either side cannot see another vehicle approaching from the other side until nearly upon the track, so that it is necessary for a driver so approaching the crossing to exercise care in watching for the possible approach of a vehicle coming upon the track from the opposite direction. Appellant lives to the east of this crossing. This road is the main traveled highway from Renton to his home.

On January 10, 1916, appellant was driving his Ford automobile from Renton east to his home. He was sitting alone in the front seat, while his mother and a lady friend were sitting in the back seat. When he arrived at the point where the road turns toward the crossing on the north side of the right of way, he stopped his automobile to let their lady friend out and go to her home, which was but a short distance from there to the north of the road. Appellant then got

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out, walked to the rear of the automobile to examine a rear tire, and then buttoned up the rear side curtain. While they were there a neighbor came along, going east in an automobile, and passed them, going over the crossing ahead of them. This neighbor, seeing appellant's automobile stopped there, supposed at first that it was because of an approaching train; so he looked with particular care to see if any train was approaching, but did not see any. Appellant had gotten into his automobile and started up the grade towards the crossing, sixty-five feet away, just as the neighbor's automobile passed over the track at the crossing. While ascending the grade at a slow speed—his automobile being in low gear—he again looked along the track for the approach of any train. There were no front side curtains to the automobile to obstruct his view in either direction. He says he looked the last time when he was about seven feet from the track, but saw no approaching train. Just as the automobile was passing over the track, there came from the east, close upon it, the rear end of a large "helper" locomotive, running backward at a speed of at least twenty miles per hour. The automobile was struck before it had cleared the crossing, and thrown forward and off the track to the south side, resulting in appellant's injuries, for which he seeks recovery. While his automobile was stopped to let the lady friend out, inspect the rear tire, and button the rear side curtain, its motor was left running, making the usual noise of such motors. From that point all the way up to the crossing, one sitting in an automobile as appellant was had a clear view for a distance of at least half a mile along the track both east and west, except for the darkness of the night. It was, however, about seven o'clock in the evening, and, being in Janu-

ary, was, of course, long after the passing of daylight. It was also a dark night. During the whole of the time appellant approached the crossing, from where he had stopped his automobile, he had a dark forest to the south of the track and towards the east for a background to his view of the track; rendering it highly probable that he could not distinguish a dark object upon the track, such as a locomotive, during any of this period, unless it be quite close to him. This condition seems to have been about the same, so far as his view is concerned, even when he was very near to the track looking to the east. The ground was covered with snow about eight inches deep. This, it seems, would have no material influence upon the effect of the forest background, in so far as his ability to see a dark object upon the track is concerned, though it probably had the effect of materially deadening the sound of the approaching locomotive, especially when we take into account the fact that it was running on a slight down-grade.

As to what lights were upon the locomotive, the evidence is in conflict. It may be conceded that there was a red lantern hanging near the center of the rear end of the tender, and if we were triers of the facts we would be inclined to conclude that the preponderance of evidence showed that an ordinary white hand lantern was hanging on the lower south corner of the rear of the tender; but the evidence is in some conflict even as to this. While the evidence is in conflict as to whether or not the headlight on the front end of the locomotive was burning, there is abundant evidence warranting the jury in believing it was not then burning, but came on after the locomotive had struck the automobile and passed over the crossing, after which it was turned on when the train crew came back

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to see the result of the collision. It is plain that there was no headlight on the rear of the tender, such as is sometimes found on locomotives designed to run backwards as much as forwards. Appellant says he saw no lights at any time when he looked east along the track as he was coming up the grade approaching the crossing. Viewed in one aspect, this may seem somewhat difficult to believe, in view of the almost certain fact that the red lantern at least was on the rear of the tender and could have been seen for a long distance towards the east; but that there was no other light then on the locomotive capable of being seen by appellant as he approached the track, the jury may have well believed from the evidence; and as to the red light, or even the white light, upon the rear of the tender, the jury may well have believed from the evidence that, while either was capable of being seen by appellant, neither was consciously noticed by him because of his looking for something that would indicate the approach of an engine or train from that direction, and that neither would have suggested to his mind, or to the mind of a reasonably cautious person in appellant's position, that such lights were upon a locomotive running backward at such a speed out in the country towards this crossing. As to any signal by way of sound which might have been given from the locomotive, either bell or whistle, the evidence is also in conflict; but it was clearly such as to warrant the jury in believing that no sound signal of any kind was given from the engine of its approach to the crossing until almost the instant the automobile was struck.

We do not understand counsel for respondent railway company to seriously contend that there was not sufficient evidence to carry the case to the jury as to the question of its negligence, if the question of appel-

lant's contributory negligence were not in the case. Indeed, we see no room for any such contention, in view of the fact that the locomotive was running backwards at such a rate of speed over this country crossing with no headlight on the rear of the tender indicating that it was running in that direction, and no other lights upon it other than possibly the red and white lanterns which were on the rear of the tender and which would not suggest to an observer of reasonable caution, even if he saw either of them, that the engine was running in that direction at such a place as on a main line track out in the country over a road crossing. Counsel for respondent seek to have us shut our eyes to the question of its negligence, and proceed upon the theory that such negligence is not a subject for proper inquiry at this time, since they are relying upon the contributory negligence of appellant to defeat his recovery. This view of the case, we cannot assent to. This is one of those cases where the question of appellant's contributory negligence is intimately related to the question of respondent's negligence, since it was the negligent acts of respondent which largely induced appellant to act as he did. When respondent's servants failed to give such signals by sound or lights as would attract the attention of one about to pass over this country crossing, indicating that the locomotive was running in that direction, it clearly was guilty of negligence; and such negligence becomes little short of a controlling factor in determining whether or not appellant was guilty of contributory negligence in acting as he did. As was well said by Judge Fullerton in *Hull v. Seattle, Renton & Southern R. Co.*, 60 Wash. 162, 110 Pac. 804:

“A victim of an accident is entitled to have his conduct judged by the circumstances surrounding him at the time of the accident—by the conditions as they

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appeared to one in his then situation—and if his conduct when so judged appears to be that of a reasonably prudent person, he cannot be said to be guilty of negligence.”

This is not only the rule applicable generally to contributory negligence, but it has peculiar force and application to conditions which are the creations of a defendant's relying upon the contributory negligence of the injured person to escape responsibility, when such conditions would naturally influence the action of the person charged with contributory negligence. This is the principle upon which our decision in *Richmond v. Tacoma R. & Power Co.*, 67 Wash. 444, 122 Pac. 351, was largely rested, which dealt with a situation, we think, even less favorable to the injured person than that with which we are here dealing. We are also to remember that this is not a case where we are asked to decide negatively that there is not sufficient evidence of negligence on the part of respondent to warrant recovery; but we are asked to decide affirmatively that it has been conclusively proven that appellant was guilty of contributory negligence—a question as to which the burden of proof rested upon respondent. As pointed out in the *Richmond* case, greater caution is to be exercised in deciding, as a matter of law, that a fact which the law requires to be affirmatively proven has been conclusively proven, than in merely deciding, as a matter of law, negatively, that a fact has not been proven. It seems to us that there is greater danger of invading the province of the jury in the former than in the latter case. That contributory negligence is an affirmative defense, casting the burden of proof upon the defendant to establish it, is the well settled law of this state. *Benson v. English Lumber Co.*, 71 Wash. 616, 622, 129 Pac. 403.

Counsel for respondent cite and rely upon our decisions in the following steam and suburban electric railway cases: *Woolf v. Washington R. & Nav. Co.*, 37 Wash. 491, 79 Pac. 997; *Cable v. Spokane & Inland Empire R. Co.*, 50 Wash. 619, 97 Pac. 744, 23 L. R. A. (N. S.) 1224; *Aldredge v. Oregon-Washington R. & Nav. Co.*, 79 Wash. 349, 140 Pac. 550; *Allison v. Chicago, Milwaukee & St. Paul R. Co.*, 83 Wash. 591, 145 Pac. 608. The *Woolf* case involved an accident at a country crossing occurring in the daytime, when the plaintiff could, or must, have seen the approaching train from a point a considerable distance before going upon the crossing, the train being pulled by the engine and running forward in the usual way a train would be expected to be running out in the country. The *Cable* case differs from the *Woolf* case in no material respect, except that it was an electric train running in the same manner, which could have been, or was, seen by the plaintiff as he approached the track in ample time to have enabled him to have stopped and let it pass. The *Aldredge* case involved the injury of the plaintiff at a country crossing, just prior to which he did not look or listen for a train in any manner, though he had ample opportunity for seeing the train approach before going upon the crossing, and the train was running forward in the usual manner, as it would be expected to run at such a place. The *Allison* case involved injuries caused by the driver of an automobile running his automobile against a slowly-moving freight car which was being switched across Pacific avenue, in Tacoma, at a place where the injured plaintiff must have known that cars were often switched. That was a case of the automobile running into the car, rather than the car running into the automobile, the car being struck a considerable

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distance back of its forward end as it was moving at the rate of only four miles an hour across the avenue at a point where the exercise of any sort of care would have enabled the plaintiff to see the car in time to stop his automobile and avoid the accident.

Counsel for respondent also cite and rely upon the following street car cases: *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018; *Skinner v. Tacoma R. & Power Co.*, 46 Wash. 122, 89 Pac. 488; *Hellesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458; *Fluhart v. Seattle Elec. Co.*, 65 Wash. 291, 118 Pac. 51; *Slipper v. Seattle Elec. Co.*, 71 Wash. 279, 128 Pac. 233; *Stueding v. Seattle Elec. Co.*, 71 Wash. 476, 128 Pac. 1058; *Heidelbach v. Campbell*, 95 Wash. 661, 164 Pac. 247; *Herrett v. Puget Sound Traction, Light & Power Co.*, 103 Wash. 101, 173 Pac. 1024. In each of those cases dealing with injuries which occurred in the nighttime, the plaintiff carelessly put himself in the way of an on-coming street car, well-lighted within and with the usual headlight burning in such manner as to evidence to any one in the position of the plaintiff that the car was coming in his direction; and in each of those cases dealing with injuries which occurred in the daytime, the plaintiff carelessly put himself in front of an on-coming car which he either saw, or must have seen, by the exercise of the slightest care, was coming in his direction. Had there been a headlight upon the rear of the tender, or had the engine been running forward toward appellant with its headlight burning, there would be some room for arguing that he should be held guilty of contributory negligence, as a matter of law, under the decisions relied upon by counsel for respondent.

It is argued in behalf of respondent that, notwithstanding the want of a headlight upon the rear of the

tender and the possible want of sound signals by whistle or bell from the locomotive, appellant could nevertheless have stopped his automobile after seeing, or after he must have seen, the approaching locomotive in time to avoid the accident. This is a plausible argument which might well be addressed to the jury; but when we consider how close appellant must have been to the track when he first became conscious of the locomotive backing down upon him at such a considerable speed, and the absence of sound signals or warning lights suggesting to him that it was moving in his direction, we feel quite convinced it cannot be said, as a matter of law, that he did not do all that a reasonable person would have done in the situation he, for the instant only, found himself. The main general fact which stands out in this case, in the way of holding, as a matter of law, that appellant was guilty of contributory negligence, is that the jury could well believe that there were no lights upon, or sound signals given from, the locomotive indicating to appellant that it was running in his direction, or even to render him conscious of its presence, until almost the instant of the collision.

We have referred to the Chicago, Milwaukee & St. Paul Railway Company as though it were the only defendant and respondent in the case. This we have done merely for convenience of expression. The Pacific Coast Railroad Company also became a defendant and respondent in the case. The two companies, however, have joined in one brief, and each relies alone upon the contributory negligence of appellant as grounds for the sustaining of the judgment notwithstanding the verdict. We therefore find it unnecessary to notice whether or not there is any difference as to the liabilities of these two defendants and respondents.

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The judgment notwithstanding the verdict is reversed, and the cause remanded to the trial court with directions to enter a judgment upon the verdict in favor of the appellant, Hines.

MAIN, C. J., FULLERTON, MOUNT, and HOLCOMB, JJ., concur.

[No. 14791. Department One. January 10, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
J. E. GRANT, *Appellant*.¹

CRIMINAL LAW (193)—CONTINUANCE—ABSENCE OF WITNESS. It is not error to refuse a continuance because of the absence of a witness wanted for the purpose of impeaching a prospective witness for the state who was not called to testify.

SAME (236-2)—OPENING STATEMENT—IRRELEVANT TESTIMONY. It is not error to exclude the opening statement of counsel and evidence offered as to the impeachment of a prospective witness for the state who was not called to testify, as the evidence became irrelevant.

RAPE (17)—EVIDENCE—CREDIBILITY OF PROSECUTOR. In a prosecution for statutory rape of one under the age of consent, it is improper to ask the prosecuting witness whether any one had ever hugged or kissed her before, as it did not imply unchastity, even if that could be shown to affect her credibility.

CRIMINAL LAW (313)—TRIAL—INSTRUCTIONS. Error in an instruction will not be considered on appeal, where appellant fails to indicate wherein it is faulty and did not propose a better one.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered December 20, 1917, upon a trial and conviction of rape. Affirmed.

E. Pruyn, for appellant.

Arthur McGuire, for respondent.

CHADWICK, J. — Defendant was charged and convicted of the crime of rape. When the case was called

¹Reported in 177 Pac. 784.

for trial, one Arthur Smith, who had been subpoenaed as a witness, was not in attendance upon the court, whereupon counsel for defendant filed a motion for a continuance, which he supported by an affidavit setting out what the witness would swear to if present in court. The facts sought to be shown by the witness were a set of circumstances tending to impeach the fidelity of appellant's wife, the mother of the prosecuting witness. The subpoena was issued; the motion and affidavit were filed in the evident belief that Mrs. Grant would be called as a witness. She was not called, and the developments of the trial were such that the facts sought to be established became wholly irrelevant. There was no error in the refusal of the court to grant a continuance.

When the state had rested, counsel for appellant began to make an opening statement, saying that he expected to prove that Mrs. Grant had maintained an adulterous intercourse with a man living in Grant county; that, when appellant discovered her infidelity, dissensions arose, but that they afterwards reconciled their differences and continued to live as husband and wife, upon the understanding that Mrs. Grant would testify as a witness against the interloper in a civil action to be begun by appellant and for which he had engaged counsel; that, at about the time they were ready to start the action, appellant was arrested on the present charge; that Mrs. Grant had caused this to be done for the purpose of concealing her lewdness, whereupon, after some colloquy, the court refused to permit counsel to continue his opening statement. Counsel was then permitted to make an offer to prove the things which the court had held to be immaterial. For the reason given under the first assignment of error, we think the court did not commit any error. The testimony offered could have no bearing, except

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as it might affect the credibility of Mrs. Grant, and she was not called as a witness.

Error is assigned in that the court sustained an objection to the question: "Did anybody ever hug or kiss you before this man?" The prosecuting witness was under the age of consent, and the objection was properly sustained. If we grant that a showing of unchastity may be considered by the jury as affecting the credibility of a witness, we are unwilling to write it down, as a matter of law, that the things referred to would even imply unchastity.

The giving of the following instruction: "You are the judges of the credibility of the witnesses and of the facts proven, the law you will take from the court as set out in these instructions," is complained of. Counsel does not indicate wherein the instruction is faulty. Nor did he propose one that would better state the rule. In this state of the record, we do not feel called upon to pursue the inquiry.

Finally, it is said that the proof is insufficient to sustain the verdict. We have read the entire record and are satisfied that there was enough evidence to sustain the verdict.

Affirmed.

MAIN, C. J., TOLMAN, and MITCHELL, JJ., concur.

[No. 14825. Department Two. January 10, 1919.]

ROY W. NEVIN, *Plaintiff*, v. PACIFIC COAST & NORWAY
PACKING COMPANY, *Defendant*.

F. J. WILSON, *Petitioner and Appellant*, v.
E. SCHOENWALD *et al.*, as *Receivers etc.*,
Respondents.¹

PARTIES (43, 44)—METHOD OF BRINGING IN NEW PARTIES—CITATION. In receivership proceedings, upon petition for an accounting and to discharge the receiver, parties other than the receiver cannot be cited to show cause on ten days' notice why they should not be brought in as parties defendants, as such substitute for summons would ignore the statute, Rem. Code, § 220.

RECEIVERS (75, 80)—ACTIONS—REMEDIES AGAINST RECEIVER IN RECEIVERSHIP. Upon charges of fraud and collusion in the appointment of a receiver, challenging the validity of the receivership and all the orders made therein, involving others not parties, it is discretionary with the trial court to refuse to entertain a petition in the receivership and to relegate the petitioner to an independent action.

PARTIES (37)—NEW PARTIES—TIME FOR INTERVENTION. A petition charging fraud and collusion in a receivership and seeking to bring in new parties is too late as a petition for intervention, when it was not filed until three years after appointment of the receiver and final judgment on plaintiff's claim.

Appeal from orders of the superior court for King county, Smith, J., entered January 14, 1918, vacating the petition of a stockholder for equitable relief and quashing service of the petition and an order to show cause, in receivership proceedings, after a hearing before the court. Affirmed.

E. M. Farmer, for appellant.

Winfield R. Smith, for respondents Schoenwald *et al.*

Sidney J. Graham, for respondents Steberg *et al.*

PARKER, J.—F. J. Wilson, a stockholder in the Pacific Coast & Norway Packing Company, seeks, by his

¹Reported in 177 Pac. 739.

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petition filed in this action, in which receivers have been appointed for the company by the superior court for King county, to have the receivers removed and dispossessed of the property of the company in their hands; to compel an accounting by the receivers, particularly as individuals, and by certain named other parties, for all of the property of the company and the alleged earnings thereof which have come into their hands; and to have the order of the superior court appointing the receivers, and all orders of the court made in the receivership, set aside and held for naught, to the end that the company be restored to its possession and enjoyment of such property and the alleged earnings thereof. The relief sought by Wilson is rested upon the alleged collusion and fraud practiced by the receivers and the other parties named in the petition against whom it is directed, resulting in the bringing about of the receivership and the placing of the property of the company therein beyond the control of its officers. The case is before us upon Wilson's appeal from an order of the superior court sustaining the motion of the receivers to strike his petition from the files, and from an order sustaining motions of the other parties against whom the petition is directed to quash the order to show cause and service thereof upon them by which it was sought to obtain jurisdiction over them; such parties appearing specially for the sole purpose of making such motions.

In September, 1914, the plaintiff, Nevin, commenced this action in the superior court for King county against the defendant packing company, seeking recovery of a money judgment, and also seeking the appointment of a receiver for the defendant and its property. No one other than Nevin and the packing

company was a party to the action. The defendant was then a corporation organized under the laws of the state of Minnesota, and was authorized to do, and was doing, business in this state and in the territory of Alaska, its principal business office being in the city of Seattle, in this state. The defendant appeared in the action and answered to the merits. Thereafter, on September 16, 1914, the superior court entered its order in the action appointing E. Schoenwald "receiver in this action of all the property, assets and business of the defendant." Soon thereafter Schoenwald duly qualified as such receiver, taking his oath of office and filing his bond as required by the order of his appointment. Soon thereafter the superior court appointed S. T. Hills as a joint receiver with Schoenwald, who also duly qualified as such. At all times since then these receivers have continued to be the duly appointed, qualified and acting receivers for the property and business of the defendant, administering its affairs as such receivers in this action. In December, 1917, more than three years after the appointment and qualification of the receivers, and approximately three years after they had taken possession of the larger part of the property and business of the defendant situated in this state and in Alaska, Wilson filed in this action his petition praying for relief as above indicated. The petition alleges as grounds for relief, in substance, that the defendant packing company was not, at the time of the appointment of the receivers, insolvent or in danger of insolvency, and that there was no cause then, nor any since, warranting the appointment of a receiver for its property or business; that the appointment of the receivers was collusively and fraudulently procured by false representations made to the court by the receivers themselves and the other parties named in Wilson's petition against whom he seeks

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relief; that the purpose of all these parties in so procuring the appointment of the receivers was to "freeze out" certain of the stockholders of the defendant and gain possession of its property; and that the trustees of the defendant packing company have refused the relief asked by Wilson. Since it is apparent that the superior court refused to entertain the petition because the relief sought, even as against the receivers, should be sought in another independent action, and because the court did not acquire jurisdiction of the persons against whom relief is sought, other than the receivers, by its order to show cause and the service thereof, we think this is a sufficient statement of the allegations of the petition, the relief prayed for, and the parties against whom such relief is sought.

Upon the filing of the petition, the superior court issued its order to show cause, as a process to bring into the case all the parties named in the petition against whom relief was sought. This order was in usual form, directing the parties to show cause why the relief prayed for in the petition should not be granted, was made returnable ten days after its issuance, and was within that period served upon the parties against whom relief was sought. The parties, other than the receivers, appeared specially and made motions to quash the order to show cause and the service thereof as a process seeking to bring them into the case and compel them to respond to the petition, challenging the court's jurisdiction for want of proper process directed against and served upon them. The receivers moved to strike the petition from the files of the case upon the ground, in substance, that the court had not acquired jurisdiction of the other parties against whom relief was sought, that their presence in court was necessary to the determination of the matters presented in the petition, and that the matters so

presented were in no event properly determinable in this action, but should be heard and determined, if at all, in a separate action instituted for that purpose.

Did the court acquire jurisdiction of the persons, other than the receivers, against whom the petition was directed and from whom an accounting was sought? It seems to us that this question must be answered in the negative, since they, with the exception of Nevin, were not parties to the action before the filing of the petition, and they never became such by the issuance of a summons nor by any general appearance in the action. If the order to show cause and the service thereof can be said to be a sufficient process to bring these parties into the case as defendants, manifestly a defendant sued upon a simple debt obligation can be brought into the action as a defendant and compelled to answer or suffer a default against him by the issuance and service of a mere order to show cause, instead of by the issuance and service of a summons as prescribed by our statute relative to the commencement of civil actions. To permit such a method of procedure to be substituted for the issuance and service of a summons would be to ignore the plain provisions of the statute. Rem. Code, § 220. *State ex rel. Boardman v. Ball*, 5 Wash. 387, 31 Pac. 975, 34 Am. St. 866; *Cherry v. Western Washington Industrial Exp. Co.*, 11 Wash. 586, 40 Pac. 136; *State ex rel. Nolte v. Superior Court*, 15 Wash. 500, 46 Pac. 1031; *Interior Warehouse Co. v. Hays*, 91 Wash. 507, 158 Pac. 99. It seems quite clear to us that the quashing of the order to show cause and the service thereof was proper, and that the court's order to that effect must be affirmed. It is so ordered.

Was the court in error in refusing to entertain Wilson's petition by the striking of it from the files of the case upon the motion of the receivers made in that be-

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half? It is difficult to view the contention of counsel for Wilson other than as being inconsistent. He argues that the receivership proceedings should be held void and of no effect upon the ground that they were brought about by fraud, and at the same time he asks that all the parties against whom the petition is directed be compelled to account in the receivership proceedings. We think, however, in view of the nature of the alleged relationship and concert of action between the receivers and the other parties, there was, in any event, a discretion vested in the trial court as to whether or not it would permit Wilson to seek the relief which he prays for as against the receivers in this action or relegate him to an independent action; in other words, assuming that the trial court might have entertained Wilson's petition in the receivership as against the receivers alone, whether or not it would do so was a matter within its discretion. *Meeker v. Sprague*, 5 Wash. 242, 31 Pac. 628; *Blake v. State Sav. Bank*, 12 Wash. 619, 41 Pac. 909; *Schwabacher Brothers & Co. v. Schade & Parshall Co.*, 99 Wash. 271, 169 Pac. 783. We think that the challenging of the validity of the receivership proceedings by Wilson from the beginning, and the seeking by him to set aside, upon the ground of fraud, all orders of the court made therein, was sufficient to warrant the court in refusing to entertain his petition for relief in this action.

Treating Wilson's petition as one directed against the receivers and the plaintiff herein alone, it possibly could have been entertained by the court as a petition for intervention, had it been timely filed, but having been filed three years after the appointment of the receivers and the commencement of the administering of their trust, and presumably about the same length of time following the entry of the final judgment upon the claim of the plaintiff, Nevin, in the action, the

record before us being silent as to the exact date of the judgment, the filing of the petition comes too late to be entertained even as one of intervention. *Wooding v. Wooding & Co.*, 10 Wash. 531, 39 Pac. 137; *Seattle & Northern R. Co. v. Bowman*, 53 Wash. 416, 102 Pac. 27; *Longmire v. Yakima Highlands Irr. & Land Co.*, 95 Wash. 302, 163 Pac. 782. We are of the opinion that the order of the superior court refusing to entertain Wilson's petition and striking it from the files of the case must be affirmed. It is so ordered.

By what we have said we do not want to be understood as in the least impairing Wilson's right, as a stockholder of the defendant packing company, to petition the superior court looking to the compelling of the receivers to properly account, as such, in the receivership, or to make any application to the trial court looking to the compelling of the proper performance of the duties of the receivers as such. His right to so apply to the superior court in this action is, of course, the same as that of any stockholder of the defendant packing company.

The orders appealed from are affirmed.

MOUNT and HOLCOMB, JJ., concur.

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Citations of Counsel.

[No. 14838. Department Two. January 10, 1919.]

GLORVINA REDELSHEIMER, *as Executrix etc.*,
Respondent, v. LAURA ZEPIN *et al.*,
Appellants.¹

WILLS—CONSTRUCTION—PAYMENT OF DEBTS. A testator charges the payment of all debts, separate and community, upon his half of the community property, notwithstanding Rem. Code, § 1342, making each share liable therefor, and the wife takes her half freed therefrom as against other legatees, where, by the first paragraph, he directed his executors, as soon as they have sufficient funds, "belonging to my estate," to pay the funeral and administration expenses and all debts properly chargeable against his estate, and by the next paragraph willed to his wife her half of the community property, which, by Rem. Code, § 5917, he had no authority to will.

Appeal from an order of the superior court for King county, Jurey, J., entered November 26, 1917, in favor of the plaintiff, in an action to construe a will, tried to the court. Affirmed.

Chas. Ethelbert Claypool and Hastings & Stedman (Karl H. Kober, of counsel), for appellants, contended that the community interest of the survivor is subject to community debts. Rem. Code, § 1342; *Ryan v. Fergusson*, 3 Wash. 356, 28 Pac. 910; *Denton v. Schneider*, 80 Wash. 506, 142 Pac. 9; *Peck v. Peck*, 76 Wash. 548, 137 Pac. 137; *McCullough v. Lauman*, 38 Wash. 227, 80 Pac. 441.

The will must show a clear intention to charge debts against the particular property, and in the absence of express directions, the debts are apportioned ratably among legatees. 40 Cyc. 2071, 2073; 18 Am. & Eng. Ency. Law (2d ed.), 714.

Peters & Powell and Wright, Kelleher & Allen, for respondent, contended, *inter alia*, that the will must be

¹Reported in 177 Pac. 736.

considered as intending a benefit to the legatee. *Wallace v. Wallace*, 23 N. H. 149.

The situation of the parties and attending circumstances should be considered for the purpose of showing what the testator meant. Schouler, Wills (5th ed.), § 466; *Armstrong v. Barber*, 239 Ill. 389, 88 N. E. 246; *Herring v. Williams*, 153 N. C. 231, 69 S. E. 140, 138 Am. St. 659; *Maxcy v. Oshkosh*, 144 Wis. 238, 128 N. W. 899, 31 L. R. A. (N. S.) 787; *Dana v. Dana*, 185 Mass. 156, 70 N. E. 49; *Settle v. Shafer*, 229 Mo. 561, 129 S. W. 897; *Gould v. Chamberlain*, 184 Mass. 115, 68 N. E. 39.

The intention to charge his half of the estate with community debts need not be expressed, but the same may be inferred if necessary to effect the testator's object and purpose. 40 Cyc. 1072; *Calder v. Curry*, 17 R. I. 610, 24 Atl. 103; *Currier v. Currier*, 70 N. H. 145, 47 Atl. 94; *Rice v. Harbeson*, 63 N. Y. 493; *Quinby v. Frost*, 61 Me. 77; *Stevens v. Burgess*, 61 Me. 89.

An intention that a legacy be paid at all events, is sufficient to charge the balance of the estate with the debts. 40 Cyc. 1072; *Quinby v. Frost*, *supra*; *Bank of United States v. Beverley*, 1 How. (42 U. S.) 134; *Fenwick v. Chapman*, 9 Pet. (34 U. S.) 461.

The devise to the widow was a specific bequest. *Currier v. Currier*, *supra*.

MOUNT, J.—The question presented upon this appeal is the construction of a will of Julius Redelsheimer, deceased. Prior to his death, Mr. Redelsheimer made a will, the first two paragraphs of which are as follows:

“(1) I direct that my executrix and executor hereinafter named, to wit: Glorvina Redelsheimer and Benjamin Moyses, as soon as they have sufficient funds in their hands, belonging to my estate, pay my funeral

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expenses, expenses of my last illness, and all just debts, demands and charges, of every kind and nature, properly chargeable against my estate.

“(2) It was formerly my intention to give, bequeath and devise to my beloved wife, Glorvina Redelsheimer, all of my estate at the time of my death, in appreciation of the great assistance she has rendered me in accumulating the property possessed by us, but our money and property has become such an amount that I feel that her community interest, being one-half ($\frac{1}{2}$) of our entire estate, will afford her all the money and property needed or desired by her and that our entire estate would be a burden to her.

“I therefore give, bequeath and devise to her one-half ($\frac{1}{2}$) of our estate, the same being her community interest therein, and I also give and bequeath to her all household furniture, furnishings, personal effects, automobiles or other conveyances and all my jewelry.”

The will then makes several bequests to charitable institutions and to nephews and nieces. After Mr. Redelsheimer's death, the will was regularly probated in the superior court of King county. Thereafter, Benjamin Moyses, one of the executors, died, and Mrs. Redelsheimer thereafter continued to act as sole executrix. Pending the administration, the question arose whether the community debts should be paid *pro rata* by the whole estate, or whether these debts should be paid from the estate of the deceased, being one-half the community estate. Upon a hearing before the superior court of King county for the purpose of construing the will, it was adjudged that the will of Mr. Redelsheimer

“charged the payment of all his debts and obligations, including the debts and obligations of the marital community of himself and his wife, Glorvina Redelsheimer, upon his one-half interest in the community property of the said marital community.
...”

This appeal is prosecuted from that order.

It is argued by the appellants that, because the statute, at Rem. Code, § 1342, provides that, "upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts," and because there is no clear provision in the will that the debts shall be paid from the community interest of the testator, and because the terms of the will do not clearly show the intention of the testator that his share of the community estate shall pay all the debts; therefore, the debts should be borne ratably by the whole estate, and that the balance of the estate, after the debts are paid, be distributed according to the terms of the will. It is no doubt true that the creditors of the estate may subject the whole estate to the payment of their claims. If a testator should direct that the debts should be paid from his part of the community estate, and such estate was not sufficient to pay all the debts of the community, the creditors, under the statute above referred to, might subject the whole estate to the payment of the debts, but that is as far as this statute goes. The first paragraph of the will directs that the executors,

"As soon as they have sufficient funds in their hands, belonging to my estate, pay my funeral expenses, expenses of my last illness and all just debts, demands and charges, of every kind and nature, properly chargeable against my estate."

The estate of the deceased was one-half of the community estate. All the property was community property. We think it is clear from this provision of the will that the testator intended that his estate should pay all the debts of the estate, both separate and com-

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munity, and that the balance of his estate should be distributed as provided in the will. According to the second paragraph of the will, above quoted, the testator gave to his wife only her interest in the estate, beside the personal effects named. He was not authorized to dispose of that interest by will. Rem. Code, § 5917. We are satisfied, when these two provisions of the will are read together, it was plainly the intention of the testator to give to his wife her interest in the community estate free from all claims or debts, so far as the other legatees named in the will were concerned. According to the provision of Rem. Code, § 1342, the share of each in the community was liable for the community debts. The interest of the testator was liable for the community debts, and in paragraph "1" of his will he declares that, as soon as the executors "have sufficient funds in their hands, belonging to *my estate*," they shall pay all just debts properly chargeable against "*my estate*." We think it is plain from this paragraph that the testator intended that the debts, demands and charges against the estate should be payable from his part of the estate.

We are satisfied, therefore, that the trial court properly construed the will, and the order appealed from must be affirmed.

MAIN, C. J., HOLCOMB, FULLERTON, and PARKER, JJ.,
concur.

[No. 14841. Department One. January 10, 1919.]

THEODORE O. LOVELAND *et al.*, as *Brenard
Manufacturing Company, Appellants,*
v. REESE COMPANY, *Respondent.*¹

CONTRACTS (33, 72) — SEVERABLE CONTRACTS — REQUISITES — CONSTRUCTION—FAILURE OF CONSIDERATION. A contract by a manufacturer to furnish articles for prizes and the services of a skilled organizer for a trade extension campaign, and the merchant's promissory notes given in consideration thereof, constitute one indivisible contract, and there can be no recovery on the notes in case of failure to furnish the articles or services constituting the consideration.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered December 24, 1917, upon findings in favor of the defendant, in an action on promissory notes, tried to the court. Affirmed.

V. O. Nichoson, for appellants.

O. L. Boose, for respondent.

MITCHELL, J.—In March, 1915, the Reese Company, a corporation, of Sunnyside, Washington, executed and delivered its six promissory notes aggregating \$340, payable to Brenard Manufacturing Company, a partnership, of Iowa City, Iowa. None of the notes being paid at maturity, this action was brought on all of them. The Reese Company defended on alleged failure of consideration, claiming the notes were given in consideration of a trade extension campaign contract made to it by Brenard Manufacturing Company which remained unperformed at the time of the commencement of the suit. The trial court made findings and entered judgment that there had been failure of consideration, ordered the notes cancelled and dis-

¹Reported in 177 Pac. 719.

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missed the action. Brenard Manufacturing Company appealed.

Respondent, a merchant, desiring to improve and extend its business, entered into the trade extension campaign contract, the purpose of which was to encourage contests among its present and prospective patrons and customers for certain designated prizes. The prizes were to consist of numerous articles, including a piano, gentleman's and lady's gold filled watches, and thence down through a long list of "Queen Esther" silverware of seventeen different patterns, from tablespoons by the dozen to a single gravy ladle. The piano was to be furnished by respondent. All the other prizes were to be furnished by appellant f. o. b. factory or other distributing point. Appellant was to furnish one book entitled "The Brenard Mfg. Co's. Trade Booster Methods," twenty posters 28x36, five hundred \$5 trading books, one set of "Display Card" signs, one electro-plate of piano, instructions for newspaper advertising, which, if done, was to be without expense to appellant, thirty-six certificates for piano votes in denominations of 5 to 100,000 votes, and six due bills ranging from \$275 to \$300, each good for one Claxton Piano when accompanied with the difference in cash as designated by the due bill. Appellant was to furnish an enrollment register, or tally book, in which to enter the scores of the contestants for prizes and from which, at stated intervals, correct reports were to be made to appellant during the six months the contest should run. To add zest to the campaign, the prizes were to be placed on exhibition, and to still further enliven things, appellant was to send on an organizer to explain the benefits of the enterprise to each of more than 100 prospective customers whose names were furnished by respondent and with whom appellant was supposed to have already had some intro-

ductory correspondence to prepare and make easy the way of the organizer. It was understood by respondent and appellant's soliciting agent, when the contract was discussed earlier in the year, that the campaign should commence about the first of April. From about March 23, 1915, and thence along from time to time for about a month, appellant forwarded portions of the supplies and prizes, some by express, others by insured parcel post and registered mail. By the contract, appellant agreed to send its organizer to Sunnyside within six weeks from the starting of the campaign for constructive campaign work and the completion of the contesting clubs. Without notice to respondent of the precise date he would arrive, the organizer called on respondent on April 23, 1915, to commence work, but upon learning that the score register, or enrollment book, which it appears was most indispensable, and some of the most important prizes had not yet been received by respondent, the organizer declined to commence the campaign.

From time to time, respondent promptly advised appellant of the nonarrival of portions of goods and supplies supposed to have been shipped, causing appellant to send tracers, as the testimony shows, for such goods claimed to have been forwarded. Considerable correspondence took place between the parties during the summer and fall months, each blaming the other for the failure of the campaign. In the meantime, the enrollment register was received, of which appellant was notified, which, with all other goods received, were kept intact without being displayed by respondent. Appellant threatened suit on the notes then due, though offering to perform the contract at some future time. Respondent denied any matured liability. In the meantime, on November 15, 1915, without notice to respondent, appellant sent another organizer to Sun-

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nyside, when, upon consideration of the fact that the watches (which were important and necessary in the plan of advertising) had not yet been received, together with the fact that winter was approaching, it being considered an unfavorable season for such a campaign, this organizer refused to commence the campaign.

Without any further attempt at adjustment or performance of the contract, the appellant sued in June, 1916, at which time, indeed at the trial of the case, the watches, among the most important prizes, had not been received. In addition to the defense of failure of consideration, respondent plead and kept good a former tender of those goods and supplies it had received, which were awarded to appellant by the judgment.

The defense in the case was well established by the proof, for the contract of appellant to furnish all the goods, a substantial and important part of which was never supplied, together with the skilled services of an organizer, constituted an indivisible, nonseverable contract and consideration for the notes sued on, the nonperformance of which called for a cancellation of the notes.

Judgment affirmed.

MAIN, C. J., MACKINTOSH, TOLMAN, and CHADWICK, JJ., concur.

[No. 14845. Department One. January 10, 1919.]

WASHINGTON UNION COAL COMPANY, *Appellant*, v.
THURSTON COUNTY *et al.*, *Respondents*.¹

TAXATION (59)—VALUATION—MINING PROPERTY. An assessment of coal lands at from \$5 to \$15 per acre for coal values is not void as arbitrary and without the exercise of discretion, where the deputy making the assessment made an investigation on the land and based his judgment thereon and on information gained from coal owners, miners and prospectors.

SAME (59). Coal mining property surrounding a proven mine may be given an assessed valuation as such where there is reason to find and believe that it has coal values.

SAME (96, 210)—PRESUMPTION—REASONABLENESS—EVIDENCE—SUFFICIENCY. The presumption in favor of the reasonableness of the assessed valuation of coal mining property must be overcome by clear and satisfactory evidence, and this is not done where it appears that further prospecting work and investigation was necessary before the company's engineer could give his opinion as to whether it contained coal that could be mined at a profit.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered October 1, 1917, in favor of the defendants, dismissing an action to recover taxes paid and for an injunction, tried to the court. Affirmed.

A. C. Spencer, Frank C. Owings, and John F. Reilly, for appellant.

Thos. L. O'Leary, for respondents.

MITCHELL, J.—In the fall of 1907 and the spring of 1908, appellant, a coal mining company, purchased 5,044.49 acres of land and the right to explore, mine and take coal from beneath the surface of 255.5 other acres of land, all situate in Thurston county and lying within a territory about seven miles east and west and

¹Reported in 177 Pac. 774.

three miles north and south. The property consists of about ten detached tracts, the greater portion of the land lying in one parcel situated in the south central part of the territory mentioned. Near the center of the largest tract, appellant, since about 1908, has been, and is now, actively engaged in the operation of a coal mine, known as the Tono Coal Mine, for commercial purposes.

Early in the year 1908, the county assessor, pursuant to advice from the state tax commission, instructed his field deputy assessor that, where lands had been taken as coal lands and he was satisfied there was coal, to make assessments therefor. It appears that no such assessments had been made on the property involved for the year 1907. The deputy assessor for that year, confessedly without any knowledge or experience as to values of coal mines and prospects, though well acquainted with many property owners and others who for years had prospected for and mined coal in this field, went into the field and gathered information from twenty to thirty present and former owners, prospectors and coal miners of years of experience on some of the lands now owned by appellant, as well as other lands immediately adjacent and within the territory. Thereupon the deputy assessor assessed the lands of appellant (whether it had yet taken title or not) and much, or nearly all, of the other lands in this field at \$10 per acre for coal values, and taxes were levied thereon for that year. Thereafter, from year to year until 1915, some of the parties, other than the appellant, owning property interspersed with appellant's lands, procured whole or partial relief from coal assessments, from the county board of equalization. Appellant paid its taxes without protest until 1915, when, after the as-

assessment had been made for that year, it claims to have learned for the first time that its assessments had for years included coal values. In the meantime, the proof does not show when, the assessments for coal values in this field had been changed from the uniform sum of \$10 to different amounts per acre. The county assessor for the year 1915 continued the assessments of appellant's property as they were last assessed. In doing so, he testified that he considered former tax payments without protest; he knew of the Tono Mine and its operation; he had been on plaintiff's lands and was acquainted with the soil in places; knew that some of it had coal outcroppings; that coal had been taken out of other mines on this or adjacent lands; he knew the people in that community burned coal right along, taken from the lands in the vicinity; and that, among other things, for the purpose of fixing coal values, he checked up with the Pierce county assessor as to values placed on coal lands in that county. The assessments now objected to for the year 1915 range from \$5 to \$15 per acre for coal values, except 288.55 acres which are free from any such assessment.

Appellant applied to the board of equalization in 1915 for a reduction of its assessments to the extent of all coal values, except as to 871.92 acres immediately surrounding the mine. The board refused to change the assessments. After the levy and prior to delinquency, appellant tendered to the county treasurer in full payment of its taxes for the year 1915 an amount which equaled its taxes, eliminating all coal values on its lands other than the 871.92 acres referred to. It is to be noticed that, by the tender, appellant took the position that it was not chargeable with any tax on its sub-surface mineral rights in 255.5

acres, which was its contention before the board of equalization. The county treasurer refused the money. Appellant then paid under protest the taxes on the sub-surface mineral rights in the 255.5 acres, and afterwards brought this action to recover back that amount and to enjoin the collection of all other taxes based on coal values other than in the 871.92 acres. Upon trial, the action was dismissed by the superior court.

Appellant's first argument is as follows:

"The addition in 1908 to the assessed value of appellant's property, of \$10 per acre for supposed coal values (from which the 1915 assessment was copied) was arbitrary, fraudulent, illegal and void."

It is said by counsel that no court has ever countenanced assessments of this sort. The strength of their argument in this respect is shown by that portion of their brief as follows:

"This court itself has consistently held, beginning with the case of *Whatcom County v. Fairhaven Land Co.*, 7 Wash. 101, 34 Pac. 563, a case in which there was evidence of a blanket assessment being placed without investigation on the property owner's land, 'An arbitrary assessment of property, without the exercise of the assessor's judgment, based on knowledge or information, is an illegal assessment, and is a fraud upon the property owner, and may be taken advantage of by the latter in some manner.' "

Such argument and authority are not in point here because the deputy who made the assessment in 1908 did make an *investigation* on the land and exercise his judgment based thereon and on *information* gained from present and past owners, miners and prospectors. A number of those persons testified at the trial of this case to facts identical with those of which the deputy assessor had been informed. As to the suggestion of arbitrariness by reason of the uniformity of \$10 per

acre, it is not found in the assessment of 1915, now complained of, for the assessments range from \$5 to \$15 per acre for coal values and were placed on the property by the assessor upon exercising his judgment, based not only on the records for years showing these to be coal lands, but also upon knowledge and investigation in the year 1915 of an active coal mine, of the soil and coal outcroppings, former mining on these and adjacent lands, residents using coal taken from these or contiguous lands, and inquiry of the assessor's office and examinations of the records in an adjoining county as to coal land values. As shown by the protest to the board of equalization and the tender to the county treasurer, appellant contends that all assessments for coal values, other than in lands just around its mine, are baseless and void, upon the theory, as we understand, that the county has not demonstrated that the lands contained workable commercial bodies of coal and that the assessors are not scientists and experts.

Appellant, a coal mining company, after prospecting, including some drilling, purchased all of these lands about the same time. Manifestly it was persuaded by supposed hidden values. It must have been satisfied of sufficient and tempting prospects. It has since developed and proved a mine, and is now engaged in operating it for commercial purposes, since which time it has done a very little drilling to further determine the value of its holdings. Bought as, and partially proven by appellant to be, coal lands, we are not advised if there has been any depreciation in the coal values of these lands. Mining property such as this, surrounding a proven mine, although in the prospective stage, may be given an assessed valuation as such, not as a mine, but as a prospect, where there is

reason for the assessing officers to find and believe that the property has coal values. *First Thought Gold Mines v. Stevens County*, 91 Wash. 437, 157 Pac. 1080. For such purpose the county assessor and the board of equalization are not required to be mining experts, nor employ experts to properly and legally assess it.

As to the reasonableness of valuations placed on property for the purpose of taxation, the well established rule favors and supports the county assessor and board of equalization, and one who challenges such valuations assumes a task not measured or accomplished with less than clear and convincing proof. *Templeton v. Pierce County*, 25 Wash. 377, 65 Pac. 553; *Northern Pac. R. Co. v. Pierce County*, 55 Wash. 108, 104 Pac. 178; *Heuston v. King County*, 90 Wash. 200, 155 Pac. 773.

In the present case, we find, in addition to the presumption in favor of the assessments, active examination and investigation by, and knowledge on the part of, the assessor, together with due consideration by the board of equalization, to support the assessment and taxes complained of. To overcome this presumption of fairness of the assessment, appellant furnished, in effect, the testimony of its superintendent in the mine, who admits he has never made any personal investigation of any of the property outside of sections 20 and 21 (the Tono Mine) for the purpose of seeing whether or not coal lies under the surface, and no investigation of that character has been made by the company since he has been superintendent; and the testimony of appellant's mining engineer in charge at the mine, who says he did the prospecting work for appellant before the purchase of these lands and has been with appellant at all times since, that only two diamond drill holes had been made on any of appel-

lant's property outside of the immediate vicinity of the mine since the property was purchased, and that the company has not made any thorough investigation of the property, and finally, on cross-examination, he said that if he were asked by a prospective purchaser whether any other seams of coal, outside of sections 20 and 21, could be mined at a profit, he would want to make further investigation and spend money for that purpose before giving his opinion. Such proof is not sufficient to overcome the presumption in favor of the assessment upon which rest the taxes sought to be avoided.

Lastly, it is claimed appellant has been discriminated against because other lands in the community are free from such assessments. It is true that some of appellant's lands, as well as other tracts intermingled therewith, are not assessed for coal values, and that still other properties are so assessed, but the proof fails to show lack of foundation for these differences in the opinion and judgment of the assessing officers.

Judgment affirmed.

MAIN, C. J., and TOLMAN, J., concur.

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Statement of Case.

[No. 14867. Department One. January 10, 1919.]

EDWARD A. KAVAFIAN, *Respondent*, v. SEATTLE
BASEBALL CLUB ASSOCIATION, *Appellant*.¹

THEATERS AND SHOWS (2)—BASEBALL EXHIBITION—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Evidence by defendant to the effect that a grand stand at a baseball park was screened from foul balls for sixty feet on each side of the center, in accordance with plans for the structure, raises an implication or admission of negligence in failing to protect spectators by screens for more than thirty feet on each side of the center.

SAME (2) — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. Whether a spectator at a ball game, struck by a foul ball, was guilty of contributory negligence or assumed the risk, in taking a seat in the grand stand unprotected by screens when there were vacant seats so protected, involves the question whether he acted as a reasonably prudent person in relying on the implied representation that his seat was reasonably safe, and is for the jury (Overruled on rehearing).

EVIDENCE (199-1)—OPINION EVIDENCE—DUE CARE—CONCLUSIONS. In an action for injuries sustained by a spectator struck by a foul ball at a baseball game, a witness who was an authority on the game and familiar with the situation may not be asked whether there was sufficient screening of the grand stand for the protection of the spectators, as it calls for a conclusion to be drawn only by the jury.

ON REHEARING EN BANC.

THEATERS AND SHOWS (2)—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS. A spectator, at a ball game, struck by a foul ball, who voluntarily took and retained a seat in the unscreened section of the grand stand when there were a great number of vacant seats protected by screens that he might have chosen, assumes the risks or is guilty of contributory negligence precluding any recovery (MITCHELL, TOLMAN, and MAIN, JJ., dissenting).

Appeal from a judgment of the superior court for King county, Frater, J., entered November 21, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

¹Reported in 177 Pac. 776; 181 Pac. 679.

J. Y. C. Kellogg and *Robert L. Blewett*, for appellant, contended that the plaintiff was guilty of contributory negligence. *Blakeley v. White Star Line*, 154 Mich. 635, 118 N. W. 482, 129 Am. St. 496, 19 L. R. A. (N. S.) 772; *Crane v. Kansas City Baseball & Exhibition Co.*, 168 Mo. App. 301, 153 S. W. 1076; *Wells v. Minneapolis Baseball & Athletic Association*, 122 Minn. 327, 142 N. W. 706, Ann. Cas. 1914D 922, 46 L. R. A. (N. S.) 606.

Reynolds & Harroun, *J. Speed Smith*, and *Will H. Merritt*, for respondent, cited: *Edling v. Kansas City Baseball & Exhibition Co.*, 181 Mo. App. 327, 168 S. W. 908.

MITCHELL, J.—Respondent, having purchased a ticket to the grand stand, attended a game of baseball conducted by appellant in Seattle. During the game he was hit on the knee by a foul ball and injured. In the complaint he charges appellant with negligence in failing to maintain a screen in front of the seat he occupied. Appellant denied negligence on its part and affirmatively answered that, on the day of the accident, it had provided a screened section ample and sufficient for all patrons who cared to sit behind it, thus performing its full duty to the public; that respondent was acquainted with the game and its attendant dangers; and that, in taking a seat outside the screened section, he was guilty of contributory negligence and assumed the risk of the accident and injury. The affirmative matter of the answer was denied by the respondent. There was a trial by a jury, which returned a verdict for \$1,000. The trial court denied motions for a directed verdict, for a judgment notwithstanding the verdict, and for

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a new trial. Judgment was entered on the verdict, from which an appeal was taken.

Assignments of error are based on the denials of the motions, and alleged error in refusing to admit certain evidence offered by appellant.

The ball park was new, not yet fully completed. The seating arrangements were in the usual form, the center front of the grand stand being about fifty-eight feet from the home plate. The plans provided for one hundred and twenty feet of netting in front of the seats in the grand stand—sixty feet on each side of the center. Respondent had attended a number of games at the old park in Seattle and four or five at this new park. On the day he was injured, he arrived during the second inning of the game and hurriedly took the first convenient seat he reached in the grand stand, where he was injured. There is no dispute that the grand stand was screened for thirty feet on each side of its center. All the evidence of the respondent tended to show he was sitting on a front seat well within sixty feet, and more than thirty feet to the right, of the center of the grand stand, and that there was no screen in front of him. On the other hand, the evidence of appellant, including the plans of its buildings introduced in evidence, tended to show the grand stand was screened sixty feet on each side of its center, but is silent as to just where respondent was sitting. All the seats protected by sixty feet of screen in the center of the grand stand were not taken when respondent arrived. No usher was in attendance.

In keeping with what may be considered common knowledge, the evidence showed there was danger from foul balls at all places back of the foul lines, the danger being greatest as to force and frequency of such

balls, at points directly behind the batter, the danger thence radiating and decreasing.

The jury was properly instructed, and we must view the situation through the judgment of the jury as expressed by the verdict. By such rule it must be considered as proven that there were only thirty feet of screen on each side of the center of the front of the grand stand, and that respondent when injured was sitting in the front row at a point between thirty and sixty feet from the center of the grand stand and without the protection of a screen. At the same time, by undeniable implication, appellant admitted that reasonable care and prudence required it to have the front of the seats screened to a point beyond the respondent's seat, by the introduction of evidence to establish that fact. The jury was justified in concluding the situation defined negligence, which, as Judge Cooley in his work on Torts says, is "the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury."

As to contributory negligence on the part of plaintiff, or that he was at fault in not taking a seat in the portion that was screened, this involves the determination as to whether or not he acted as a reasonably prudent person would under similar circumstances. He came in, as he had a right to do, while the game was in progress and took the first vacant seat he noticed. By inference, he was invited to that seat. He paid an extra amount for the privilege of the grand stand. There was the implied representation on the part of appellant that the seat he took was reasonably safe. There was no caution or notice to him that it was other than safe. The ultimate fact of

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whether he could or should, at the time, have reasonably anticipated being struck and injured in that place by a foul ball, like the alleged negligence of appellant, was properly submitted to the jury.

After appellant's witnesses had testified that the building plans called for one hundred and twenty feet of screen and that that much had been put up—the latter being disproved to the evident satisfaction of the jury—appellant called a witness, an acknowledged authority and writer on the game, who, after testifying to his constant attendance at the games in Seattle for years and the frequency and uncertainty of the force and direction of foul balls, was asked: "Did you ever see a time there was not sufficient screening at that park for the protection of the spectators?" The question was objected to on the grounds that it called for a conclusion to be drawn only by the jury. The court properly sustained the objection and advised appellant: "Let him state how much screening there was; but whether it is sufficient, or not, is for the jury."

Finding no error, the judgment is affirmed.

MAIN, C. J., MACKINTOSH, TOLMAN, and CHADWICK, JJ., concur.

ON REHEARING.

[*En Banc.* May 31, 1919.]

PER CURIAM.—Upon a rehearing of this case, a majority of the court is of the opinion that the conclusion arrived at in the Departmental opinion is incorrect. The facts in the case show that the respondent entered the grand stand, owned and operated by appellant, during the progress of a baseball game; that he was familiar with the manner in which baseball games are conducted, having been a frequent spectator

thereof; that the grand stand had a screen in front of a portion of it, back of the home plate, and that in this screened portion there were a great number of vacant seats, any of which he was entitled to take under his admission ticket; that he voluntarily took a seat outside of the screened area; and that, having gone there to see a baseball game, it must be true that, before many minutes had elapsed, he became conscious of the fact that between him and the balls no screen existed, if he was not aware of that fact at the very moment of taking his seat. Conscious of the fact that balls are very often hit "foul," and that wild throws sometimes result in the ball falling among the spectators, and conscious of the fact that there was no protection between the balls and himself, he continued to occupy a seat in that unscreened portion until he received his injury.

It matters not whether one designates his act in this regard contributory negligence or views it as in the nature of assumption of risk, the result is the same. The place in which he could have taken a seat would have fully protected him against the ordinary and usual hazards incident to witnessing the game in question, but he chose to sit elsewhere and substitute for that safety the compensating facility of vision. If there was a chance of danger, the respondent voluntarily took it. Having purchased a ticket which offered him a choice of two positions, he, with full knowledge of the risk of injury, chose the more dangerous position. The view here expressed would seem to be supported by the following cases: *Blakeley v. White Star Line*, 154 Mich. 635, 118 N. W. 482, 129 Am. St. 496, 19 L. R. A. (N. S.) 772; *Crane v. Kansas City Baseball & Exhibition Co.*, 168 Mo. 301, 153 S. W. 1076; *Wells v. Minneapolis Baseball & Athletic Ass'n*, 122

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Minn. 327, 142 N. W. 706, Ann. Cas. 1914 D 922, 46 L. R. A. (N. S.) 606.

The judgment of the lower court is reversed and the cause dismissed.

MITCHELL, J. (dissenting)—I adhere to the views expressed in the former opinion in this case, and therefore dissent.

TOLMAN and MAIN, JJ., concur with MITCHELL, J.

[No. 14872. Department Two. January 10, 1919.]

*In the Matter of the Estate of BENJAMIN L. DECKER.*¹

EXECUTORS AND ADMINISTRATORS (88)—COURTS (51)—PROBATE—JURISDICTION—OUTSIDE CLAIMS—TITLE TO PROPERTY. In the settlement of an estate in probate, the court has no jurisdiction to determine the title to property between outside parties in no way affecting the interests of the estate.

Appeal from a judgment of the superior court for Adams county, Holden, J., entered December 8, 1917, approving an executor's final account and distributing property of an estate, after a hearing upon objections before the court. Affirmed.

Samuel P. Weaver, for appellants.

G. E. Lovell and *C. W. Rathbun*, for respondent.

MAIN, C. J.—The parties to this appeal are rival claimants to an undivided one-fifth interest in a certain quarter section of land located in Grant county. The appellants, doing business under the name of the Spaulding Manufacturing Company, claim title through a judgment, sale on execution, and a sheriff's deed. The respondent claims title through an alleged assign-

¹Reported in 177 Pac. 718.

ment from the person to whom the property passed by devise. Benjamin L. Decker died testate on or about the 24th day of August, 1913, and by his will devised to John V. Decker an undivided one-fifth interest in the real estate in controversy. The will was duly admitted to probate in Adams county on February 28, 1914. On May 8, 1917, the executor filed his final account and petition for distribution, praying that the interest of John V. Decker in the real estate above referred to be distributed to L. A. Womach. The appellants filed objections to the final account and denied that the property should be distributed to Womach, who claimed under an assignment from John V. Decker. The respondent Womach objected to the litigation of the controversy over the title to the property in the probate proceeding, and claimed that it was not a proper matter to be litigated therein. The property was distributed by the trial court to Womach, as assignee. From this judgment, the appeal was prosecuted.

The respondent renews here the objection which he made in the trial court that the controversy over the title to the property between the parties to this appeal could not be litigated in the probate proceeding. This objection must be sustained. This is a controversy between outside parties which in no way affects the interests of the estate itself. In *In re Gorkow's Estate*, 28 Wash. 65, 68 Pac. 174, a similar question was presented. In that case a legatee had contracted with a firm of attorneys that she would pay them the sum of \$500 when they should obtain for her a certain legacy contained in the will of Rudolph Gorkow. By the contract, the \$500 was to be paid out of the legacy when collected. In due time, the right to the legacy was established and, with the exception of \$500, was paid

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to the legatee, who refused to recognize the rights of the attorneys whom she had employed. The attorneys filed a petition in the probate proceeding asking that the \$500 be paid to them. The legatee objected to the question being litigated in that proceeding because it was a matter which in no way affected the interests of the estate. The objection was sustained, and the court, in the course of the opinion, said:

“No powers are given to the court in its probate jurisdiction to hear and determine controversies between third persons which in no way affect the interests of the estate itself. It is constituted a tribunal to guard the interests of the estate only, and its powers cannot be invoked to determine outside controversies, the result of which can in no way affect the estate, either adversely or favorably. . . .”

The rule of that case is recognized in the case of *State ex rel. Keasal v. Superior Court*, 76 Wash. 291, 136 Pac. 147, where it is referred to and distinguished. The controversy upon the present appeal is one step farther removed from the probate proceeding than was the controversy in the *Gorkow* case. There the controversy was between a legatee and her attorneys whom she had employed to secure the legacy and agreed to pay them out of the sum so obtained, which sum was in the possession of the administrator. In the present case, the appellants claim through a deed issued subsequent to a sale on execution under a judgment which they had obtained against John V. Decker; and the respondents, through an assignment from him. Obviously, the estate is in no way concerned with this controversy and will not be affected favorably or unfavorably, whichever one of the parties may be entitled to the interest in the above-mentioned land which passed to John V. Decker by devise. It being a matter which cannot be litigated in the probate proceed-

ing, the appellants, in order to preserve their rights, were not required to assert them in that proceeding in response to the notice of the hearing to be had upon the final account and distribution of the estate of Benjamin L. Decker, deceased. *Martinovich v. Marsicano*, 137 Cal. 354, 70 Pac. 459.

The question is one to be litigated when one of the parties shall bring an appropriate action. In such action, the appellants will be in no way prejudiced by reason of the fact that the property was distributed to the respondent in the probate proceeding under the assignment.

Affirmed.

PARKER, HOLCOMB, and MOUNT, JJ., concur.

[No. 14876. Department One. January 10, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
POLLY WERNITSCH, *Appellant*.¹

APPEAL (272)—RECORD—AFFIDAVITS. Affidavits used upon an application for a new trial cannot be considered on appeal unless brought up by bill of exceptions or statement of facts.

APPEAL (413)—REVIEW—VERDICT. Where the evidence was conflicting and the case was submitted on proper instructions, error cannot be predicated on the insufficiency of the evidence.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered October 23, 1917, upon a trial and conviction of violating the prohibition law. Affirmed.

William M. Thompson and *Charles H. Bolin*, for appellant.

O. R. Schumann and *J. Lenox Ward*, for respondent.

¹Reported in 177 Pac. 712.

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MITCHELL, J.—Appellant was convicted by a jury of the unlawful sale of intoxicating liquor, and has appealed from the judgment entered on the verdict.

From appellant's brief, which is short and irregular, according to subdivision 2, rule 8, of the rules of this court, we understand that only two alleged errors are claimed, viz.: First, the denial of a motion for a new trial; and second, insufficiency of the evidence to justify the verdict.

As to the motion for a new trial, it was based upon grounds which required it to be supported by affidavits. It appears that affidavits were used, at least they are found in the record here only in the transcript certified to by the clerk of the trial court. These the respondent moves to strike because they are not embodied in a statement of facts or bill of exceptions certified to by the trial judge. The motion must be granted. *Hendrix v. Hendrix*, 101 Wash. 535, 172 Pac. 819.

As to the other point, the evidence was conflicting. There was positive and direct evidence to sustain every essential allegation of the information. No exception was taken to any of the instructions given to the jury. Accordingly, it cannot be successfully claimed the verdict and judgment were erroneous in this respect. *Singer v. Metz Co.*, 101 Wash. 67, 171 Pac. 1032.

Judgment affirmed.

MAIN, C. J., MACKINTOSH, TOLMAN, and CHADWICK, JJ., concur.

[No. 14901. Department One. January 10, 1919.]

C. P. BLANCHARD *et al.*, Respondents, v. PUGET SOUND
TRACTION, LIGHT & POWER COMPANY, Appellant.¹

APPEAL (465)—REVIEW—HARMLESS ERROR—INSTRUCTIONS CURED BY VERDICT. An erroneous instruction is harmless if, under the evidence, no other verdict could have been rightfully returned.

STREET RAILROADS (20) — CROSSING ACCIDENTS — CONTRIBUTORY NEGLIGENCE—DRIVER OF AUTO. The driver of an automobile, struck by a cable car at a street crossing, is guilty of contributory negligence, as a matter of law, where he saw the approaching car in ample time to have stopped, instead of which he speeded up in an attempt to cross ahead, expecting the car to slow down; and having seen the car, it is immaterial that no signal or alarm bell was sounded.

Appeal from an order of the superior court for King county, Frater, J., entered February 6, 1918, granting a new trial, after the verdict of a jury rendered in favor of the defendant, in an action for personal injuries sustained in a collision between an automobile and a street car. Reversed.

James B. Howe and *H. S. Elliott*, for appellant.

H. E. Foster, for respondents.

MITCHELL, J.—Shortly after dark on October 1, 1916, plaintiffs, husband and wife, were riding in their automobile, which collided with a street car at the crossing of 20th Avenue south and Yesler Way, in the city of Seattle, causing personal injuries and property damage to them. The charge of negligence against the defendant was responded to by a denial and an affirmative answer of contributory negligence on the part of plaintiffs. A trial by jury resulted in a verdict for defendant. The superior court, believing it

¹Reported in 177 Pac. 822.

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had used improper language in one of its instructions, granted a new trial, from which defendant appeals.

If it be considered that an erroneous instruction was given, alleged error predicated thereon was harmless, if, under the evidence, no verdict could have been rightfully returned thereon other than the one which was rendered, in which case it would be the duty of the trial court to enter judgment for defendant rather than grant a new trial.

At the place of crossing, 20th Avenue south runs north and south, and was variously estimated to be from thirty to forty feet wide between the curbs, while Yesler Way runs east and west, and upon it appellant operated a double track cable railway, the most southerly rail of which lies fourteen feet north of the south curb of Yesler Way. Both streets were paved. Yesler Way was level. Approaching Yesler Way (from the south, as respondents were traveling), 20th Avenue south, for a distance of more than a block, was of about one per cent up-grade. The cable used to draw the street car had a maximum speed of a little less than ten miles an hour. The cable car was twenty-eight feet long and could be reasonably stopped on a level within thirty or forty feet. It was going east on the southerly track at the time of the accident. For about twenty-five years, respondents had lived eight or ten blocks north of the place of the accident, and for more than four years had operated the automobile over this street crossing from two to six times a day and knew that cable cars were run on Yesler Way.

Mr. Blanchard testified that he was going north on the right side near the east curb of 20th Avenue south; that, in approaching Yesler Way, he slacked up, looking to the right, and as he got pretty near the corner, his wife, who was sitting on his right-hand side, called

out: "Pa, there is a car," whereupon he turned quickly and saw the car fifteen or twenty feet west of his course. His own language was:

"When getting near the street, naturally I slowed down, and as I got pretty near to the corner my wife, who was on my right hand side, hollered, 'Pa, there is a car,' and I turned quickly and saw it was impossible to avoid a collision, *that I would hit the car right on the side if I continued, so I speeded up a little bit, I put my foot on the accelerator and turned to the right, skipping the corner and going down the hill towards 21st street, knowing that the car would see me and would stop and in that way would let us pass without any difficulty.* The car made no effort to stop whatever, and about fifteen or twenty feet below the corner of the street it hit me right on the side. . . . The car was about 15 or 20 feet west of me when I saw it. I was then going about 6 or 8 miles an hour. . . . Before reaching the intersection of Yesler and 20th I slowed down my car to 6 or 8 miles. . . . My wife called my attention to the fact that there was a street car coming when we were close up to Yesler. At that time we had run up so that we could see the intersection very plainly. We had not gotten our front wheels into Yesler Way when my attention was called to it. We were approaching right to it, and in the next second we would be right into the Yesler car going across. When my wife called my attention to the fact that a street car was coming, I was within a few feet of being on Yesler Way. . . . I didn't look in the direction from which the street car came. I had no reason to look in that direction that I know of."

Mrs. Blanchard, after testifying that, when they reached Yesler Way, they paused to see about the cars coming, and then, just as they started up, she told Mr. Blanchard there was a car coming, further testified:

"When I saw the cable car coming we were right near the corner of Yesler, near 20th and Yesler, be-

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fore you get to Yesler. I should say I could then see west on Yesler Way half a block. I had to look past Mr. Blanchard. I didn't see it coming until we started to go across. We were just going to start up when I saw it coming. I should say Mr. Blanchard was traveling five miles an hour at that time. We were then at the corner there, just before you get into Yesler Way. I should say we were the distance of the curb on Yesler Way from the car track at that time."

The complaint alleges that the negligence of appellant consisted in

"Crossing and attempting to cross Yesler Way without a signal or alarm of any kind and without any warning, and at said time the said defendant was operating the said cable car without lights sufficient to attract the attention of any one attempting to cross at right angles on said Yesler Way. That, as the plaintiffs were attempting to cross Yesler Way, the defendant, through its officers and servants, negligently and carelessly and in total disregard to the rights of the plaintiffs in the premises, ran its cable car into and upon plaintiffs' automobile."

As to the cable car being lighted, the respondent Mr. Blanchard, in reply to the question: "As far as you could see, those lights in the car were no different from the ordinary lights in those cars, were they?", said: "No difference."

As to signal or alarm bells, while appellant submitted ample proof that signals were given, it was wholly immaterial, so far as respondents were concerned, whether any were given or not, for, by Mr. Blanchard's testimony, he saw the car before getting into danger of it, and Mrs. Blanchard testified: "When I saw the cable car coming we were right near the corner of Yesler. . . . I should say I could then see west on Yesler Way half a block."

This court said in the case of *Van Dyke v. Johnson*, 82 Wash. 377, 144 Pac. 540, with reference to a sim-

ilar situation: "Having seen and observed the car, sounding of the horn could have been of no additional efficacy in avoiding an accident." Also see *Camozzi v. Puget Sound Traction, Light & Power Co.*, 94 Wash. 545, 162 Pac. 987.

Further, if it be contended appellant was negligent other than in the matter of lights and signals, we must bear in mind the relative rights and obligations of the parties. This court, in the case of *Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284, said:

"Cars cannot turn from their course; they run on fixed tracks, and cannot accommodate themselves as readily to emergencies and cannot stop with the same promptness or facility, as drivers of free vehicles, and drivers of such vehicles must yield the right of way with reasonable promptness to the passing cars."

and again, in the case of *Arpagaus v. Washington Water Power Co.*, 86 Wash. 83, 149 Pac. 346, this court said:

"These rights are mutual and reciprocal. Each must have a due regard for the rights and safety of the other. Street cars, being operated upon fixed tracks, have in a sense a right of way over that part of the street upon which the tracks are laid. *Pantages v. Seattle Elec. Co.*, 55 Wash. 453, 104 Pac. 629. The motorman is entitled to act upon the assumption that a driver or a pedestrian will exercise due care for his own safety. It is not necessary for him to stop the car until he sees that the other is in apparent danger. *Duteau v. Seattle Elec. Co.*, 45 Wash. 418, 88 Pac. 755."

In this case it is manifest that, as respondents were situated near the curb on the east side of 20th Avenue south, just in the act of moving into Yesler Way, at the time they saw the street car fifteen or twenty feet to their left, the street car was already in and crossing 20th Avenue south.

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The proof shows respondents did nothing to absolve themselves from the performance of the duty of caring for their own safety. On the contrary, it appears that respondent was heedlessly flirting with, if not inviting, danger. Undisputed disinterested evidence shows that respondent could have easily and reasonably stopped the automobile at that place, at the speed they say they were going, within twelve inches, while, according to their own testimony, they had about fourteen feet within which to stop and avoid a collision. Instead of stopping his car, as reason and caution would suggest, he became impatient and heedless. He said: "I speeded up a little bit, I put my foot on the accelerator and turned to the right, skipping the corner and going down the hill towards 21st street, knowing that the car would see me and would stop and in that way would let us pass without difficulty." Thus, instead of stopping, as he should, respondent plainly states that he actually speeded up, turned to the right, skipped the corner, going down the hill, so as to give the street car a chance to see him that it might slow up to let him pass without difficulty.

Respondents thus carelessly placed themselves in a situation similar in principle to those discussed in the cases of *McEvilla v. Puget Sound Traction, Light & Power Co.*, 95 Wash. 657, 164 Pac. 193; *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458, and *Fluhart v. Seattle Elec. Co.*, 65 Wash. 291, 118 Pac. 51, upon which authorities it must be held, as a matter of law, that respondents were guilty of contributory negligence, preventing recovery.

It happened that the verdict, favorable to the defendants, interpreted the facts just as the law does, for, although the trial judge, in granting the respond-

ents' motion for a new trial, expressed the view that certain language used in one of his instructions was unfortunate, an examination of it in the light of respondents' own testimony convinces us that it was harmless.

The order granting a new trial is reversed, and the cause remanded with direction to the superior court to enter judgment for defendant dismissing the action.

MAIN, C. J., MACKINTOSH, TOLMAN, and CHADWICK, JJ., concur.

[No. 14921. Department One. January 10, 1919.]

CELIA ELIZABETH SHAW, *Appellant*, v. OREGON-
WASHINGTON RAILROAD & NAVIGATION
COMPANY, *Respondent*.¹

APPEAL (263, 267)—RECORDS—STATEMENT OF FACTS—NECESSITY—EVIDENCE—INSTRUCTIONS. In the absence of a bill of exceptions or statement of facts, error in instructions to the jury cannot be considered and the judgment will be affirmed and the appeal dismissed.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered April 21, 1917, upon the verdict of a jury rendered in favor of the defendant, in an action for wrongful death. Dismissed.

Robertson & Miller and *T. J. Corkery*, for appellant.

A. C. Spencer, Hamblen & Gilbert, and *John F. Reilly*, for respondent.

MITCHELL, J.—William Shaw was killed in a collision between an automobile in which he was riding

¹Reported in 177 Pac. 687.

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and a passenger train operated by the Oregon-Washington Railroad & Navigation Company, a corporation. Celia Elizabeth Shaw, the surviving wife of William Shaw, instituted this suit to recover damages. A jury trial resulted in a verdict for the defendant, upon which a judgment of dismissal was entered after denying plaintiff's motion for a new trial.

In her appeal we are not furnished with any statement of facts or bill of exceptions certified to by the trial judge. Appellant asks us to review certain instructions given to the jury, to which she saved exceptions, which are brought here by a transcript certified to by the clerk of the trial court. Upon this condition of the record, the respondent moves to dismiss the appeal and affirm the judgment. The motion must be granted on the authority of *Morgan v. Bankers' Trust Co.*, 63 Wash. 476, 115 Pac. 1047; and *Weld v. Wheeler*, 90 Wash. 178, 155 Pac. 748.

The appeal is dismissed and the judgment affirmed.

MAIN, C. J., MACKINTOSH, TOLMAN, and CHADWICK, JJ., concur.

[No. 14923. Department One. January 10, 1919.]

B. B. INMAN *et al.*, *Appellants*, v. HOME TELEPHONE
& TELEGRAPH COMPANY, *Respondent*.¹

ELECTRICITY (4)—INJURIES INCIDENT TO USE—LICENSEES. A person not a subscriber, injured by shock while using by permission a telephone in a neighbor's private residence, is a mere licensee; and such use not being within the reasonable contemplation of the telephone contract, and telephones not being highly dangerous, the company is not liable in the absence of proof that the injury was wilful, wanton, or malicious; hence proof of the accident does not make a *prima facie* case on the doctrine of *res ipsa loquitur*.

Appeal from a judgment of the superior court for Spokane county, Jurey, J., entered February 7, 1918, upon granting a nonsuit, dismissing an action for personal injuries sustained while using a telephone. Affirmed.

Robertson & Miller and *Rosenhaupt & Grant*, for appellants.

Post, Russell & Higgins, for respondent.

MACKINTOSH, J.—J. W. Fortune had in his residence a telephone installed by the defendant, which owned the wiring, instrument and equipment and furnished the ordinary telephone service. The plaintiffs were neighbors, living about a block distant from Fortune, and were not telephone subscribers. The plaintiff wife was injured while using the telephone, all the testimony in regard to the matter being the following:

"Q. Were you at the Fortune home on September 5, 1916? A. Yes, sir. Q. Did you try to use the telephone on that day? A. Yes. Q. Had you frequently used that phone before? A. Yes, sir. Q. I will ask you if you had permission to use the phone? A. Yes, sir. Q. On this date? A. Mr. Fortune told

¹Reported in 177 Pac. 670.

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me I could use the phone at any time. Q. How does it come you were using Mr. Fortune's phone on this day? A. Mr. Fortune gave me permission to use it. Q. When? A. He told me — we were next door to him there; he said to come and use our phone any time you want to; I went in and asked Frances if I could use the phone and she said yes. Q. What happened? A. I took the receiver and held it to my ear; no one answered; I stood there, it seems to me, it must have been like about five minutes; there were two little girls standing out in the hall; I made the remark 'It is funny central does not answer'; I no more than said that, than there was a report went off, and then smoke flew out, and it threw me back against the wall."

At the close of the plaintiffs' case, the court sustained a challenge to the sufficiency of the evidence. Our view, which we are about to express, of the law applicable to the facts of this case renders it unnecessary to pass upon the question of whether, in any event, the plaintiffs were entitled to have their case presented to the jury on the doctrine of "*res ipsa loquitur*." That doctrine would only supply for the plaintiffs the proof of negligence which is not sufficient to render the defendant liable to them if the plaintiff wife was, while using the telephone, a trespasser or bare licensee. If that was the relationship between the parties, the defendant must be proven to have been guilty of more than mere negligence, and to become liable the injury must have been proven to have been willful, wanton or malicious; and bare proof of the happening of the accident would not suffice to make a *prima facie* case. Apparently without precedent, this case, on principle, discloses the plaintiff wife at best in the position of a mere licensee. The plaintiffs were not subscribers for telephone service and had no contractual relationship with the company. The only obligation owing them came through the use of For-

tune's telephone, by his permission, but without the defendant's knowledge; and he was not the owner of the telephone, but only a purchaser of telephone service. His contract with the company gave him no agency for it. The telephone, unlike other electrically-operated instruments, is not highly dangerous, in that its wires do not carry a dangerous current, so we have eliminated from our consideration those cases of liability of conveyers of high electric current for injuries to trespassers, licensees, children, etc., and have only to determine the rights under the Fortune contract. *Cumberland Telegraph & Telephone Co. v. Martin's Adm'r*, 116 Ky. 554, 76 S. W. 394, 77 S. W. 718, 105 Am. St. 229, 63 L. R. A. 469; *Brucker v. Gainesboro Telephone Co.*, 125 Ky. 92, 100 S. W. 240.

That contract gave its protection to all persons who were intended to be benefited by it; it assured a right of recovery for mere negligence to the Fortune family, its servants, guests, persons working about the house for the benefit and at the request of the owner, and all persons who could be said to have been in the contemplation of the company and the subscriber as liable to make use of the telephone in the reasonable, ordinary and customary conduct of a home such as the one involved. *Fish v. Waverly Electric Light & Power Co.*, 189 N. Y. 336, 82 N. E. 150, 13 L. R. A. (N. S.) 226; *Union Light, Heat & Power Co. v. Arntson*, 157 Fed. 540; *Southern Bell Telephone & Telegraph Co. v. McTyer*, 137 Ala. 601, 34 South. 1020, 97 Am. St. 62; *Reagan v. Boston Electric Light Co.*, 167 Mass. 406, 45 N. E. 743; *Anderson v. Seattle-Tacoma Interurban R. Co.*, 36 Wash. 387, 78 Pac. 1013, 104 Am. St. 962; *Bradley v. Sobolewsky*, 91 Conn. 492, 99 Atl. 1067.

But as to all persons outside the contemplation of the contract, the company, in order to be liable for their injury, must be shown to have been more than

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merely negligent. The plaintiffs were accustomed to use this telephone; and Fortune had established, in effect, for them a free telephone service. This he could not do, for no such use of this telephone was reasonable or anticipated by the company when it was installed, or sanctioned thereafter. It may be that, in public or business places, such use is taken into consideration when telephones are placed there, and that the company is liable to such users as to subscribers; but the private residence, in the absence of agreement to that effect, is not supposed to be a public telephone station. Those using such telephones for purposes of their own and not in the interest of the owner of the house, and for their own convenience, and not casually, and not as members of the household, either permanently or temporarily, are at best, as far as the company is involved, bare licensees. *City of Greenville v. Pitts*, 102 Tex. 1, 107 S. W. 50, 132 Am. St. 843, 14 L. R. A. (N. S.) 979; *Stansfield v. Chesapeake & Potomac Telephone Co.*, 123 Md. 120, 91 Atl. 149, 52 L. R. A. (N. S.) 1170; *Cumberland Telegraph & Telephone Co. v. Martin's Adm'r*, 116 Ky. 554, 76 S. W. 394, 77 S. W. 718, 105 Am. St. 229, 63 L. R. A. 469.

As between Fortune and the plaintiff wife, she was entitled to the exercise of ordinary care for her safety. *Hanson v. Spokane Valley Land & Water Co.*, 58 Wash. 6, 107 Pac. 863. But as between the parties to this suit, she was no more than a mere licensee, and no proof having been presented of willful injury, the plaintiffs were not entitled to recovery. *Jones, Telegraph and Telephone Companies* (2d ed.), § 218; *Minneapolis General Elec. Co. v. Cronon*, 166 Fed. 651, 20 L. R. A. (N. S.) 816.

Judgment affirmed.

MAIN, C. J., MITCHELL, TOLMAN, and CHADWICK, JJ.,
concur.

[No. 14925. Department Two. January 10, 1919.]

E. M. WHITTEN *et al.*, Respondents, v. A. SILVERMAN
et al, Appellants.¹

ELECTIONS (56)—CONTESTS—JURISDICTION—"PRECINCTS"—DIKING DISTRICT. A diking district is not a "precinct," within Rem. Code, § 4941, authorizing contests of elections for all county and precinct officers, in view of the diking law, Id., §§ 4091 to 4136, making a diking district an organized public entity, distinct from and free from all control by the county; and in the absence of express statutory authority the courts have no jurisdiction of a contest of an election for commissioners of a diking district.

Appeal from a judgment of the superior court for Wahkiakum county, Hewen, J., entered May 1, 1918, upon findings in favor of the plaintiffs, in an election contest, tried to the court. Reversed.

Henry Crass, for appellants.

W. F. Magill and *Geo. T. Hanigan*, for respondents.

PARKER, J.—This is an election contest proceeding, commenced in the superior court for Wahkiakum county by Whitten, Harper and Risk, claiming to be the duly elected commissioners of Diking District No. 2 of that county, against Silverman, Foster and Burke, who, upon the face of the return, appear to have been duly elected such commissioners at an election held for the choosing of commissioners of that district on March 5, 1918. Trial in the superior court for that county upon the merits resulted in findings and judgment in favor of Whitten, Harper and Risk, declaring them to be the duly elected commissioners of the district, and annulling the election of Silverman, Foster and Burke. The contest was waged and the judgment rendered upon the ground of illegal votes hav-

¹Reported in 177 Pac. 737.

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ing been cast at the election for Silverman, Foster and Burke which, if excluded from the count, would result in Whitten, Harper and Risk receiving a majority of the votes cast at the election. Silverman, Foster and Burke have appealed from the judgment of the superior court to this court.

It is contended in appellants' behalf that the superior court is without jurisdiction to entertain an election contest between rival claimants for the office of diking district commissioner, and that the superior court erred in overruling the challenge to its jurisdiction made in appellants' behalf. The contest was instituted in the superior court under Rem. Code, § 4941 *et seq.*, relating to election contests in the superior court between claimants for "*county*" and "*precinct*" offices. That section, in so far as we need here notice its provisions, reads as follows:

"Any elector of the proper county may contest the right of any person declared duly elected to an office to be exercised in and for such county; and also any elector of a precinct may contest the right of any person declared duly elected to any office in and for such precinct, for any of the following causes: . . .

"(5) On account of illegal votes."

The argument of counsel for appellants is, in substance, that, since this is the only statute we have providing for the prosecution of election contests in the courts, and since it in terms provides for such contests only with reference to "*county*" and "*precinct*" offices, neither of those terms can be held to mean "*diking district*," and therefore there is no authority for the prosecution of an election contest in the courts between rival claimants to the office of diking district commissioner. Counsel invoke the law as announced by this court in *Parmeter v. Bourne*, 8 Wash. 45, 35 Pac. 586, 757, holding that the superior court has no

jurisdiction over the subject-matter of a contest of a county seat election; and also *State ex rel. Fawcett v. Superior Court*, 14 Wash. 604, 45 Pac. 23, 33 L. R. A. 674, holding that the superior court has no jurisdiction of the subject-matter of an election contest between claimants to a city office. In the *Fawcett* case, Judge Dunbar, speaking for the court, said:

“We think the almost universal rule is that, when the legislature has acted, and has prescribed subjects of contest, such subjects are to the exclusion of others. *Jennings v. Joyce*, 116 Ill. 179 (5 N. E. 534). To the effect that contest of the election is a judicial function only in so far as made such by special statute, see *Reynolds & Henry Const. Co. v. Police Jury of Ouachita Parish*, 44 La. An. 863 (11 South. 236).

“Sec. 427 of the Gen. Stat. [now § 4941, Rem. Code] provides that ‘any elector of the proper county may contest the right of any person declared duly elected to an office to be exercised in and for such county; and also any elector of a precinct may contest the right of any person declared duly elected to any office in and for such precinct,’ etc. This is all the provision the law makes for contesting election cases, and the specific provisions made in this section must, under all rules of statutory construction, be held to fall under the rule that the expression of one excludes the expression of the other, and therefore it must be concluded that there is no statutory provision for contesting the election of a municipal officer.”

The statute has since then remained unchanged, and the holding of those cases has not been departed from. It would seem, therefore, that, unless the word “precinct,” as used in the election contest statute, can be held to mean “diking district,” an election of diking district commissioners is no more subject to contest in the courts than is a city office.

The real question then is, Are the commissioners of Diking District No. 2 of Wahkiakum county precinct

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officers within the meaning of Rem. Code, § 4941, of the election contest statute above quoted from? We have, therefore, to inquire concerning the nature of the organization and powers of diking districts under our statutes, and see whether such a district is a public corporation and possesses an entity and powers of managing its own affairs independent of county control, or is a mere precinct or district of the county, under county control. If the former, it would seem that it could not be regarded as a precinct within the meaning of Rem. Code, § 4941, above quoted from; while if the latter, it might possibly be held to be a precinct within the meaning of that section, even though it be called a "district." In Rem. Code, §§ 4091 to 4136, inclusive, relating to the creation and the powers of diking districts, we find the following: Section 4091 reads as follows:

"Any portion of a county requiring diking, which contains five or more inhabitants and freeholders therein, may be organized into a diking district, and when so organized, such district, and the board of commissioners hereinafter provided for, shall have and possess the power herein conferred or that may hereafter be conferred by law upon such district and board of commissioners, and such district shall be known and designated as diking district No. — (here insert number) of the county of ——— (here insert the name of county) of the state of Washington, and shall have the right to sue and be sued by and in the name of its board of commissioners hereinafter provided for, and shall have perpetual succession, and shall adopt and use a seal. The commissioners hereinafter provided for, and their successors in office, shall, from the time of the organization of such diking district, have the power, and it shall be their duty, to manage and conduct the business and affairs of the district; make and execute all necessary contracts, employ and appoint such agents, officers and employees as may be required, and prescribe their duties, and

perform such other acts as hereinafter provided, or that may hereafter be provided by law.”

Sections 4095 and 4096 provide for the election of commissioners, and also the qualifications of electors for that purpose. Section 4097 expressly gives to the district the power of eminent domain, to be exercised through its commissioners by the prosecution of condemnation proceedings in the courts, to acquire property and rights of way for the construction of dikes and improvements incidental thereto. Other sections give to the commissioners of the district complete supervision and control of the construction and maintenance of the dikes and other improvements of the district; the power of levying special assessment taxes, from time to time, in proportion to benefits theretofore determined by a jury or the court, and to certify their levies so made to the county authorities, to the end that they be spread upon the tax rolls of the county and collected by the county treasurer for the district; the power to issue warrants and bonds evidencing indebtedness of the district, payable from the funds of the district by the county treasurer, who becomes *ex officio* treasurer of the district, as he does of school districts. Indeed, upon the organization of the district, the county authorities have no authority or control over the district, other than to become mere agents therefor in spreading upon the tax rolls its special assessment taxes from time to time, and the collection and paying out of the same by the county treasurer upon warrants issued by the commissioners of the district. Thus it will be seen that the district is a separate and distinct organization from that of the county, managing its own affairs, and living its own life, free from control of the county authorities. We are quite unable, in the light of the statutes under

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which Diking District No. 2 exists, and the decisions of this court above noticed, to hold that the superior court had any jurisdiction whatever over the election contest sought to be waged by respondents in that court.

In view of the fact that diking districts derive their revenue from taxes in the nature of special assessments, based upon benefits, they may not be municipal corporations in the sense that a city or town is such a corporation. Probably the holding of this court in the early case of *Board of Directors Middle Kittitas Irr. Dist. v. Peterson*, 4 Wash. 147, 29 Pac. 995, would lead to this conclusion; but that they are public organized entities possessing such an independent existence and powers as to warrant us calling them public corporations, we think there can be little doubt. Such was recognized to be the nature of irrigation districts in the *Kittitas Irrigation* case, though such districts were held not to be municipal corporations within the meaning of those words as used in § 6, art. 8, of our constitution. If a diking district was, under our statutes, an arm of the county government, and its affairs in some considerable measure were subject to control by the county authorities, there might be some substantial ground for arguing that it would then be a precinct within the meaning of Rem. Code, § 4941, above quoted from, even though called "district."

Since an election contest is not a matter of judicial cognizance except it be expressly made so by statute; and since we have no statute providing for an election contest between claimants to the office of diking district commissioner, we see no escape from the conclusion that the superior court had no jurisdiction over the subject-matter of this case, and that its judgment must, therefore, be reversed and held for naught. It

may seem that the law ought to be otherwise. If so, it should be so made by the legislature and not by the courts.

The judgment is reversed.

MAIN, C. J., HOLCOMB, MOUNT, and FULLERTON, JJ.,
CONCUR.

[No. 14930. *En Banc*. January 10, 1919.]

DAN HURLEY *et al.*, *Appellants*, v. OLYMPIA OYSTER
COMPANY, *Respondent*.¹

PUBLIC LANDS (101)—FISH (3)—OYSTER LANDS—DISPOSAL BY STATE — STATUTES. The "Callow" act, Rem. Code, §§ 6806, 6807, providing for the sale of natural or artificial oyster beds to persons cultivating oysters thereon, authorizes the sale of oyster beds whether planted upon tide lands or upon lands below tide lands; in view of Rem. Code, § 6641, which defines tide lands as all lands over which the tide ebbs and flows from the line of ordinary high tide to the line of extreme low tide "excepting oyster reserves"; the intent of which is to except oyster lands from the definition of tide lands, whether upon tide lands or not.

Appeal from a judgment of the superior court for Mason county, Mitchell, J., entered March 4, 1918, in favor of the defendants, in an action of ejectment and for damages, tried to the court. Affirmed.

Thomas M. Vance and *J. H. Easterday*, for appellants.

Frank C. Owings, for respondent.

MOUNT, J.—This action was brought to eject the defendant from the possession of certain oyster lands in Mason county, and for damages for oysters taken from the lands by the defendant. The complaint alleged title in the plaintiff by deed from the state of Washington dated on March 10, 1913. The defendant, for

¹Reported in 177 Pac. 732.

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answer, denied title in the plaintiff and alleged title in itself. Upon these issues the case was tried to the court without a jury, and the trial court concluded that the defendant was the owner of the lands and entered judgment accordingly. The plaintiff has appealed.

The facts are not in dispute. It appears that, about the year 1900, the state, under the provisions of ch. 25, Laws of 1895, p. 39 (Rem. Code, §§ 6806, 6807), commonly known as the Callow act, issued deeds to the respondent and its predecessors in interest to certain tide lands known as oyster lands. These lands were described by metes and bounds. A portion of these described tracts extends below the line of mean low tide, and a portion above the line of mean low tide. The respondent and its predecessors in interest have cultivated these lands to oysters since prior to March, 1895. In the year 1913, upon the application of the appellant, the state issued a deed to the appellant for:

“All tide lands of the second class, owned by the state of Washington, lying between the line of mean low tide and the line of extreme low tide and in front of lot two (2), section twenty-three (23), township nineteen (19) north, range three (3) west W. M., with a frontage of 20.81 lineal chains, more or less, measured along the meander line, according to a certified copy of the government field notes of the survey thereof on file in the office of the commissioner of public lands at Olympia, Washington.

“Subject to such rights, title or interest as may have been acquired by the purchaser of any part of said lands as tide lands suitable for the cultivation of oysters under any deed or contract heretofore issued by the state of Washington . . .”

Under this deed the appellant claims the lands cultivated to oysters by the respondent lying between the line of mean low tide and extreme low tide. The re-

spondent claims the oyster beds lying between the line of mean low tide and extreme low tide by reason of deeds executed prior to 1900 by the state, describing the lands by metes and bounds and including therein the lands between extreme low tide and mean low tide as described in its deeds.

The main question which determines the case is whether the conveyance of oyster beds or tide lands, used for the cultivation of oysters below the line of mean low tide, by the state to the respondent and its predecessors in interest was a valid conveyance. It is argued by the appellant, in substance, that, prior to the act of March 8, 1911 (Laws of 1911, ch. 36, p. 129; Rem. Code, §§ 6641, 6641-1), the officers of the state were not authorized to convey tide lands below the line of mean low tide, because oyster lands are tide lands and there is no authority for the sale of tide lands except as provided by law with reference to such lands. It is no doubt true that oyster lands are tide lands, but it is not true that all oyster lands are necessarily tide lands as tide lands are defined by statute; for tide lands are lands upon which the tide ebbs and flows between ordinary high and extreme low water, which lands at certain periods are not covered by water. It is well known that oyster lands are generally to be found below the line of extreme low tide, or in navigable water as well as upon tide land. *State v. Sturtevant*, 76 Wash. 158, 173, 135 Pac. 1035, 138 Pac. 650. Tide lands, as described by the act of 1911, are:

“All lands over which the tide ebbs and flows from the line of ordinary high tide to the line of extreme low tide, . . . excepting oyster reserves.” Laws of 1911, p. 130, ch. 36, § 1, subd. 2 (Rem. Code, § 6641).

By this definition of tide lands, we think it is plain that oyster lands, even though upon tide lands, are

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excepted from the definition of tide lands as such. In the year 1895, by an act commonly known as the Callow act (Laws of 1895, ch. 25, p. 39, § 1; Rem. Code, §§ 6806, 6807), the legislature provided that all persons having qualifications to enable them to purchase tide lands within the state, and who in good faith entered upon tide lands not in front of any incorporated city or town, nor within two miles thereof on either side, and planted and cultivated thereon artificial oyster beds, and who continued to occupy and work the same continuously and in good faith to March 26, 1890, and were then working oyster beds in good faith, should be permitted to purchase the same for the purpose of cultivating oysters thereon. The act also provided that the deed to be issued should convey to the grantee the land for the purpose of cultivating oysters only thereon, and that, when such cultivation ceased, and upon certain conditions therein named, the land would revert to the state. It was under this act that the respondent acquired title to the oyster beds in question. It is true the words *tide lands* are used in that act, but the act does not undertake to limit the cultivation of oyster beds to tide lands defined as such. It says that all persons who

“in good faith entered upon tide-lands . . . and planted and cultivated thereon artificial oyster-beds, and who continued to occupy and work the same continuously and in good faith to March 26, 1890, and ever since said date, and who are now in possession of and working said oyster-beds in good faith, shall be permitted to purchase the same for the purpose of cultivating oysters thereon, and for no other purpose, whether said tracts were originally covered by alleged natural oyster-beds or not; . . .”

We think it was plainly the object of this act to authorize the sale of these oyster beds and to convey the same for the purpose of cultivating oysters there-

on, whether the oyster beds were above or below the lines of mean high tide or extreme low tide. As further evidencing this conclusion, in all the statutes defining tide lands, oyster lands have been always excepted. In the case of *State v. Scott*, 89 Wash. 63, 154 Pac. 165, in discussing the effect of deeds issued under the act of 1911, we said:

“These two deeds are limited by the express terms of the statute defining tide lands, then in force, to lands above the line of mean low tide, and excepting oyster lands. *Pearl Oyster Co. v. Heuston*, *supra* [57 Wash. 533, 107 Pac. 349, 832, 135 Am. St. 1007]. They did not convey any of the lands theretofore deeded under the Callow act.”

Since oyster lands and oyster reserves have been excepted from the definition of tide lands from the beginning up to the present time, we are of the opinion that, when oysters are grown upon tide lands, such oyster beds are excepted from the definition of tide lands, and the statutes relating to and defining tide lands do not include oyster beds; and we are of the opinion, also, that, under the terms of the Callow act, oyster beds planted and cultivated upon tide lands, or lands below lands defined as tide lands, may be granted by the state, and that, when deeds were made, the officers of the state making such deeds under the Callow act conveyed the right described in such deeds to the grantees. In the case of *Scott v. Olympia Oyster Co.*, 63 Wash. 364, 115 Pac. 737, in referring to the effect of such deeds, we said:

“It was intended to convey, and did convey, valuable property rights, although not a fee simple title. The interest conveyed may be regarded as somewhat similar to a base or qualified fee, although we need not hold it to be such. It would be unreasonable and an injustice to conclude that, having conveyed this particular oyster land to Gale, the state, without exer-

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cising or attempting to exercise its right of repossession, thereafter conveyed it in fee simple to appellants as tide lands, . . .”

The same is true in this case. These oyster beds have been cultivated by the respondent for many years under deeds executed by the state to the respondent and its predecessors. It would be unreasonable to conclude that the state would now, by the deed of March 10, 1913, attempt to convey a part of these oyster beds to the appellant. We think the deed upon its face clearly indicates that there was no such intention on the part of the officers executing the deed, because it says that the deed is

“Subject to such rights, title or interest as may have been acquired by the purchaser of any part of said lands as tide lands suitable for the cultivation of oysters under any deed or contract heretofore issued by the state of Washington. . . .”

thus indicating quite clearly that the deed of March 10, 1913, under which appellant claims, was not intended to convey any of the oyster beds which had theretofore been conveyed by the state to the respondent and its predecessors in interest. We are of the opinion, therefore, that the trial court correctly concluded that the deeds issued by the state to the respondent under the Callow act were executed by authority of law and conveyed to the respondent the beneficial use of the tide and other lands covered by the oyster beds, and that the deed issued by the state to the appellant did not convey any right to the appellant to enter upon the oyster beds cultivated by the respondent as described by metes and bounds in its deeds from the state.

The judgment appealed from is therefore affirmed.

MAIN, C. J., HOLCOMB, MACKINTOSH, FULLERTON, PARKER, TOLMAN, and CHADWICK, JJ., concur.

[No. 14938. Department Two. January 10, 1919.]

GENE C. GOULD, *Respondent*, v. ST. PAUL FIRE &
MARINE INSURANCE COMPANY, *Appellant*.¹

INSURANCE (91) — POLICY — BREACH — PROVISION AGAINST MORTGAGE—PAYMENT BEFORE LOSS. Under Rem. Code, § 6059-34, the placing of a chattel mortgage upon property in violation of the terms of a policy of fire insurance does not avoid the policy, where the mortgage was paid and the breach of the policy did not exist at the time of the loss.

Appeal from a judgment of the superior court for King county, Hall, J., entered January 9, 1918, upon findings in favor of the plaintiff, in an action on a fire insurance policy, tried to the court. Affirmed.

H. T. Granger, for appellant.

Smith, Chester, Brown & Worthington, for respondent.

MAIN, C. J.—The purpose of this action was to recover upon a fire insurance policy the value of an automobile destroyed by fire. In the complaint, Manuel Benson and the St. Paul Fire & Marine Insurance Company were made parties defendants. One Alfred Anderson filed a complaint in intervention. After the issues were framed, the action was tried to the court without a jury, and resulted in a judgment adverse to the defendant St. Paul Fire & Marine Insurance Company. From this judgment, the appeal is prosecuted.

To avoid confusion the parties will be designated as they appear in the proceeding in the superior court. The plaintiff, Gould, on the third day of May, 1916, being the owner of a certain automobile, sold the same to the defendant Benson upon a conditional sale contract. At the time of the sale, a substantial payment

¹Reported in 177 Pac. 787.

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was made, leaving a balance of \$1,100 due under the terms of the contract. On the day the car was purchased, the defendant the St. Paul Fire & Marine Insurance Company, at the request of Benson (the purchaser), covered the car with a fire insurance policy in the sum of \$1,100. This policy carried a loss payable clause which provided that any loss should be paid to the plaintiff Gould (the seller of the car) as his interests might appear, subject to the conditions of the policy. Subsequent to this, Benson operated the car and, from time to time, made payments as called for in the conditional sale contract. On or about the 30th day of December, 1916, while the insurance policy was still in force, the automobile was destroyed by fire. Gould brought an action on the policy to recover a sum equal to the balance then due him upon the conditional sale contract.

After the fire, and prior to the institution of the action, an assignment was made by Benson to Anderson of all his rights under the insurance policy. After the action had been instituted by Gould, Anderson intervened, claiming the right to recover on the policy the balance after Gould's claim should be satisfied. The complaint of Gould and the intervening complaint of Anderson were answered separately by the insurance company. In each answer there was an affirmative defense to the effect that, prior to the time the automobile was destroyed by fire, Benson had placed a chattel mortgage upon it and that such mortgage was in full force and effect when the fire occurred. The policy of insurance contained a clause that it should be void in the event that the property covered thereby should be incumbered by a chattel mortgage. The trial court made findings of fact and conclusions of law, and entered a judgment sustaining the right to recover

upon the complaint, and also the intervening complaint. The fire insurance company made a specific request that the court find that, after the issuance and delivery of the insurance policy, Benson executed and delivered a chattel mortgage upon the insured automobile for the sum of \$200, and that such mortgage was in full force and effect and unpaid at the time the fire occurred. The court specifically refused to make this finding. The question then is whether the evidence supports the finding refused.

Without reviewing the testimony in detail, it may be said that the evidence upon the question as to whether a mortgage had in fact been given is far from satisfactory and lacks convincing force. But conceding, without deciding, that there was sufficient evidence to sustain such a finding, the same testimony which would sustain a finding that a chattel mortgage had been placed upon the automobile would show that, if there had been such a mortgage, it had been paid prior to the fire. If a mortgage had been placed upon the automobile in violation of the conditions of the policy and had been paid prior to the time the fire occurred, it would not defeat the recovery. In that event the breach of the policy would not exist at the time of the loss. Rem. Code, § 6059-34; *Silver v. London Assurance Corp.*, 61 Wash. 593, 112 Pac. 666; *Port Blakeley Mill Co. v. Springfield & Marine Ins. Co.*, 59 Wash. 501, 110 Pac. 36, 140 Am. St. 863, 28 L. R. A. (N. S.) 596.

As we view the case, it is unnecessary to discuss or decide questions other than those already referred to. The judgment will be affirmed.

FULLERTON, HOLCOMB, MOUNT, and PARKER, JJ., concur.

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Opinion Per MACKINTOSH, J.

[No. 14959. Department One. January 10, 1919.]

GEORGE W. LEDINGHAM *et al.*, *Appellants*, v. THE CITY
OF BLAINE *et al.*, *Respondents*.¹

MUNICIPAL CORPORATIONS (159-1)—PUBLIC IMPROVEMENTS—CONTRACTOR'S BONDS—"SUPPLIES"—NOTICE. A subcontractor supplying a man and team on municipal work furnishes "labor" to the extent of the man's wages, and "supplies" in the use of the team; and under Rem. Code, § 1159-1, cannot recover on the contractor's bond for the value of the "supplies," where he failed to give notice thereof within ten days of furnishing the same as required by the act.

STATUTES (69)—CONSTRUCTION—REFERENCE TO OTHER STATUTES. It will be assumed that the judicial definition of "supplies" prior to Rem. Code, § 1159-1, giving a right of action on a contractor's bond, was incorporated therein on the passage of that act.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered April 3, 1918, upon findings in favor of the defendants, in an action to determine the validity of claims against a contractor's bond, tried to the court. Reversed.

Walter B. Whitcomb, for appellants.

Sather & Livesey, for respondents.

MACKINTOSH, J.—Respondent Schrimser furnished a team and driver for work upon a contract for the grading of streets in the city of Blaine, the team and driver were furnished to a subcontractor, who agreed to pay therefor \$6.50 per day; \$2.50 representing the man's wages, and \$4 representing pay for the use of the team. Schrimser, not having been paid, filed notice of claim against the bond furnished by the principal contractor, and in this action is asserting that claim. Schrimser did not, within ten days after beginning to furnish the use of the man and team to the subcon-

¹Reported in 177 Pac. 783.

tractor, notify the principal contractor in writing that he had commenced to deliver materials, supplies or provisions for use upon the work.

The claimant rests his right to recover without having given the ten days' notice required by ch. 167, Laws of 1915, p. 525 (Rem. Code, § 1159-1), upon the theory that he was not furnishing *materials, supplies or provisions*, but was furnishing *labor*.

There is no question that the furnishing of a man for work would be furnishing *labor*, and it is equally as unquestionable that the furnishing of a team would be furnishing a *supply*. *National Surety Co. v. Bratnaber Lumber Company*, 67 Wash. 601, 122 Pac. 337; *Hurley-Mason Co. v. American Bonding Co.*, 79 Wash. 564, 140 Pac. 575; *State Bank of Seattle v. Ruthe*, 90 Wash. 636, 156 Pac. 540. These cases defined the use of teams as a *supply* under the law as it existed prior to the passage of the law of 1915, but we must assume that, when this law was passed, there was incorporated in it the judicial definition that had theretofore been given to the word *supply*.

The record before us shows that Schrimser was furnishing both labor and supplies, for his contract called for \$2.50 per day for the wages of the driver, and these have already been paid, and \$4 per day for the use of the team, the contract being thus severable, both by its terms and by its performance. The claim for the amount due for the use of the team is not collectible in this action against the principal contractor and his bond, no notice having been given of the commencement of the furnishing of the supply.

The decree of the lower court is reversed.

MAIN, C. J., TOLMAN, CHADWICK, and MITCHELL, JJ.,
concur.

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Opinion Per MAIN, C. J.

[No. 14979. *En Banc*. January 10, 1919.]

W. E. HANSON, *as State Bank Examiner, Respondent*,
v. J. A. SODERBERG *et al.*, *Appellants*.¹

BANKS AND BANKING (3)—STOCKHOLDER'S LIABILITY—ASSESSMENT OF STOCK—POWER OF EXAMINER. Under Rem. Code, § 3327, of the banking act, which provides that the state bank examiner may if necessary to pay debts, enforce the individual liability of stockholders, the bank examiner has authority to determine the necessity and amount of an assessment upon stockholders of an insolvent bank without resorting to a judicial inquiry.

SAME. The same would be true of the act of 1917, p. 290, § 35, which gives the state bank examiner power to enforce the stockholder's liability as soon after taking possession as in his judgment may be necessary and making the failure of the stockholders to make good any impairment of the assets conclusive evidence that the double liability is necessary.

SAME. Laws of 1917, p. 290, § 35, relating to the authority to enforce the statutory liability of bank stockholders bears upon the remedy only, and is accordingly applicable to an assessment upon a bank in liquidation under the act of 1915.

SAME (3)—CONSTITUTIONAL LAW (42)—EXECUTIVE POWERS—ENCROACHMENT ON JUDICIARY—BANK EXAMINER. Conferring authority upon the state bank examiner to make and enforce an assessment upon the stockholders of an insolvent bank is not objectionable as conferring judicial power upon a ministerial officer.

Appeal from a judgment of the superior court for King county, Smith, J., entered October 27, 1917, upon findings in favor of the plaintiff, in an action to enforce the superadded liability of a stockholder of an insolvent bank, tried to the court. Affirmed.

Lockerby & Wright, for appellants.

M. M. Richardson and Hugh C. Todd (*F. C. Reagan*, of counsel), for respondent.

MAIN, C. J.—This action was brought by the state bank examiner to recover upon the superadded lia-

¹Reported in 177 Pac. 827.

bility of a stockholder in an insolvent state banking corporation. The trial resulted in a judgment in favor of the plaintiff. From this, the defendant appeals.

The facts necessary to present the legal question involved may be briefly stated. On or about July 19, 1915, the First International Bank of South Bend, being then insolvent, came into the possession and under the control of the respondent, as state bank examiner, for liquidation and distribution of its assets, under and by virtue of the provisions of the laws of 1915 of this state. The capital stock of the bank was in the sum of \$50,000 divided into 500 shares of the par value of \$100 per share, all of which had been subscribed and paid for. After the bank came into the possession of the state bank examiner, that officer ascertained that its liabilities were about \$235,000, and that the value of its assets was \$135,000, thus leaving a balance of liabilities over the assets in the sum of approximately \$100,000. The state bank examiner thereupon determined that it was necessary that the stockholders of the bank be assessed upon their super-added liability of the stock to the full extent of the par value thereof. A notice, coupled with a demand for payment, was given to each of the stockholders. The appellant was the owner of 100 shares of the stock, and his liability measured by the full par value of such stock was \$10,000. The appellant refusing to respond to the notice and make payment as demanded, the present action was instituted. The trial resulted in a judgment against the appellant for \$10,000.

The first question presented is whether, under the banking act [Laws of 1915, ch. 98, p. 279 (Rem. Code, § 3303-1)], the state bank examiner is clothed with power to finally determine the necessity for making assessment upon the stock of an insolvent bank and the

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amount of such assessment without any judicial inquiry into the matter. The constitution of this state, in § 11, art. 12, provides that each stockholder of any banking corporation

“shall be individually and personally liable equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation or association accruing while they remain such stockholders, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares.”

Substantially this same provision has been carried into the statute. Rem. Code, § 3327. In 1915, the legislature passed an act relating to the administration of banks and trust companies by the state bank examiner. This is a comprehensive statute and provides in detail how the affairs of an insolvent state bank shall be administered by the state bank examiner. Among other provisions, it contains a clause that he “may, if necessary to pay the debts of such bank or trust company, enforce the individual liability, if any, of the stockholders.”

The appellant claims that, under the provisions of this statute, and especially under the quoted language, there has not been conferred upon the state bank examiner the power to determine the assets and liabilities of the bank and, if he finds that the assets are less than the liabilities, to make an assessment upon the stockholders without a judicial inquiry and determination as to the necessity for such assessment. On the other hand, the respondent contends that the state bank examiner, under the statute, does have such power.

Without setting out in detail the corresponding provisions of the national bank act (U. S. Comp. St., 1916,

§ 9821; Rev. Stat. § 5234), it may be said that the statute of this state bears a striking similarity in many of its provisions to that act of Congress. Under the national bank act the comptroller of the currency administers the affairs of an insolvent national bank and determines the liability, if any, of the stockholders without resorting to a judicial inquiry. That act contains the provision that the comptroller of the currency "may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders." (U. S. Comp. St., 1916, § 9821.) In effect, this language is the same as that contained in the legislative act of this state above quoted.

The United States supreme court, construing the Federal act, has held that the comptroller has power to decide when it is necessary to institute proceedings against the stockholders of an insolvent national bank to enforce their personal liability; that this question is referred to his judgment and discretion, and that his determination thereof is conclusive. In *Kennedy v. Gibson*, 75 U. S. (8 Wall.) 498, upon this question, it is said:

"The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as may be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be en-

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forced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved."

The national bank act provides for the appointment of a receiver by the comptroller, and that the receiver acts under the direction of the comptroller. The view of the court, as expressed in *Kennedy v. Gibson*, *supra*, has been adhered to by that court in *Casey v. Galli*, 94 U. S. 673, and *United States v. Knox*, 102 U. S. 422.

The bank act of the state of Texas contains a provision that the bank commissioner "may, if necessary to pay the debts of such state bank, enforce the individual liability of the stockholders." Construing this statute, the court of civil appeals of Texas placed upon it the same construction which the United States supreme court had placed upon the national bank act. *Collier v. Smith* (Tex. Civ. App.), 169 S. W. 1108; *Stringfellow v. Patterson* (Tex. Civ. App.), 192 S. W. 555.

The supreme court of Arkansas, construing the bank act of that state, which contained a provision similar to that contained in the national bank act, took the same view of the scope of the power of the state bank commissioner to determine the assets and liabilities of an insolvent bank and the necessity for an assessment upon the stockholders; that is, he had the power to do these things without resorting to a judicial inquiry. *Davis v. Moore*, 130 Ark. 128, 197 S. W. 295.

So far as our inquiry discloses, no court of last resort in any state, when the precise question was directly presented, construing a law of its particular state, has taken the opposite view. This statement is made with full knowledge and after careful reading of all the authorities cited in appellant's brief. If we gather correctly the force of the argument in that

brief, it is to the effect that the courts of Tennessee, New York, Oregon and Minnesota have taken an opposite view. In *Van Tuyl v. Carpenter*, 135 Tenn. 629, 188 S. W. 234, the superintendent of banks of the state of New York, who had taken possession of an insolvent bank in that state, brought an action against a stockholder residing in the state of Tennessee. It was there held that an act which gave to the superintendent of banks power to determine the assets and liabilities of a bank and the necessity of bringing an action upon the stockholders' superadded liability without a judicial inquiry was contrary to the public policy of the state of Tennessee. That court reviews and criticises the decisions of the supreme court of the United States above cited. But whether the question was sufficiently discussed by that court in those cases does not seem to us material, because, as shown by the decisions, the question as determined is the deliberate judgment and settled doctrine of that court. How the supreme court of Tennessee would construe a statute of that state if the legislature should pass one similar to the national bank act or the statute of this state, and thereby declaring the public policy of the state to be different from that stated by the court, is a question which only that court can determine in the event the legislature should pass such a statute.

In *Sargent v. Waterbury*, 83 Ore. 159, 161 Pac. 443, 163 Pac. 416, the action was upon the balance due upon stock subscriptions and not upon the superadded liability. No reference is made in that opinion to the national bank act or the decisions of the United States supreme court construing it. Had the court intended to take a different view from that entertained by the United States supreme court it doubtless would have referred to those decisions. Whether the same rule

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should be applied when the action is for the balance due upon a stock subscription as where it is upon the superadded liability is not in the case now before us, and therefore is not pertinent to the question here to be determined.

The case of *Ueland v. Haugan*, 70 Minn. 349, 73 N. W. 169, is not in point because the statute which the court was there construing is essentially different from the national bank act, the statutes of this state, Texas and Arkansas. The statute of Minnesota contains an express provision by which the superintendent of banks is to apply to a court of competent jurisdiction.

In the *Matter of the Union Bank of Brooklyn*, 204 N. Y. 313, 97 N. E. 737, the question before us for determination was not involved. It must be admitted, however, that there are found in the New York Supplement Reports certain cases which are not in harmony with the cases above referred to from the supreme court of the United States, the court of civil appeals of Texas, and the supreme court of Arkansas.

A holding that the state bank examiner may determine the difference between the liabilities and the assets of an insolvent bank and the necessity for an assessment of the stock gives the act a construction which renders it speedy, efficient and economical. If the act should be construed that the state bank examiner must resort to a court of equity to have these matters determined before he can bring an action upon the stock, the procedure would be substantially the same as it was prior to the passage of the statute. It is well known that, under that procedure, the administration of insolvent banks was subject to much delay and involved, many times, a large amount of costs and expenses. It is to the interest of the creditors,

and also the stockholders, that the affairs of an insolvent banking institution should be wound up with reasonable expedition and with no more expense than the necessities of the situation may require. A review of the act of 1915 and a comparison of it with the national bank act indicate that the legislature must have had the Federal act in mind at the time the statute of this state was passed, and also the construction which the United States supreme court had given the Federal act. We think that the state bank examiner, in proceeding as he did in this case, was acting within the power with which he was clothed by the statute.

If the proper construction of the act of 1915 were not that above indicated, it would not follow that the judgment should be reversed. In 1917, the legislature of this state passed a banking act which, in its terms conferring power upon the bank examiner, is somewhat more comprehensive than was the act of 1915. Under the 1917 act, the state bank examiner may enforce the superadded liability of the stockholders "as soon after taking possession of any bank or trust company as in his judgment the same may be necessary," and the failure of the stockholders of any bank or trust company, immediately upon possession being taken by the examiner, to make good all impairment of its assets shall be conclusive evidence that the enforcement of "double liability is necessary." Laws of 1917, ch. 80, p. 290, § 35.

By this latter act it will be noted that the liability is to be enforced as soon after taking possession of the bank as in the judgment of the state bank examiner the "same may be necessary," and the failure of the stockholders to make good any impairment of the bank's assets shall be conclusive evidence that the enforcement of "double liability is necessary."

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Since the assessment in the present case was made under the 1915 act, and the bank was in the process of liquidation when the 1917 act took effect, it is the appellant's claim that the latter act can in no event be held applicable here. These statutes bear upon the remedy only. The liability of the stockholders remains the same as it was prior to their passage. A statute which bears upon the remedy only is applicable in liquidating the affairs of the bank even though passed subsequent to its insolvency.

In Morse on Banks and Banking (5th ed.), vol. 2, § 677, it is said:

"Thus where, at the time of the insolvency, the only remedy against the shareholders was by proceedings in equity on the part of the bill-holders, and subsequently, pending the liquidation of the affairs of the bank, a new statute was passed creating the machinery of the bank commissioners, and providing a simple and expeditious means whereby they could enforce collections from shareholders (the amount of actual liability not, of course, being varied), it was held that the shareholders in the already insolvent bank could not object to the application of this new statute to their own case. It bore upon the remedy only, not upon the liability. . . ."

The appellant further contends that, if a construction be given the statutes such as above indicated, then it cannot be sustained because it confers upon a ministerial officer judicial power. This question has also been decided against appellant's contention by the United States supreme court. *Bushnell v. Leland*, 164 U. S. 684; *In re Chetwood*, 165 U. S. 443. In the case last cited it is said:

"It has been so often decided that the authority vested in the Comptroller to appoint a receiver of a defaulting or insolvent national bank, or to call for a ratable assessment upon its stockholders, is not open to

objection because vesting that officer with judicial power in violation of the Constitution, that we have recently declined to re-examine that question."

It is probable that, in cases analogous in principle, the decisions of this court could be resorted to as sustaining the proposition that the act does not confer judicial power upon the state bank examiner in violation of the constitution. At the risk, however, of having this opinion appear superficial we will not enter upon a review of these cases, because to do so would extend the opinion, as it seems to us, unnecessarily. What remedy a stockholder would have if the state bank examiner were proceeding arbitrarily or wrongfully is not before us in this case, and it is not necessary, therefore, here to discuss or determine that question.

The judgment will be affirmed.

All concur.

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Opinion Per MACKINTOSH, J.

[No. 14985. Department One. January 10, 1919.]

CONNECTICUT INVESTMENT COMPANY, *Respondent*, v.VAN B. DEMICK *et al.*, *Appellants*.¹

MORTGAGES (109, 110)—MERGER OF TITLES—INTENTION—EXPRESS AGREEMENT. A second mortgage, assigned to an investment company, is not merged by a quitclaim deed to the assignee with an agreement to reconvey, the deed being given to secure advances for taxes, where that was not the intention, there being an express agreement that the mortgage remain in force and payments made thereon.

SAME (57)—BONA FIDE HOLDER—PREEXISTING DEBT. Where a subsequent mortgage was taken for a pre-existing debt, the mortgagee is not a holder for value as against a prior mortgage supposed by him to be released.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered April 6, 1918, in favor of the plaintiff, in an action to foreclose a mortgage, tried to the court. Affirmed.

Skuse & Morrill, for appellants.

Zent & Powell, for respondent.

MACKINTOSH, J.—The plaintiff is endeavoring to foreclose a mortgage upon certain property the title to which is in the appellant Demick. This property, on April 30, 1912, was owned by one Kornmeyer, at which time there existed upon it a first mortgage given to the New World Life Insurance Company to secure the payment of \$4,200. Kornmeyer, on that date, executed a second mortgage upon the property, which, on June 12, 1914, was assigned to the plaintiff, the assignment being filed for record September 2, 1914. This is the mortgage involved in this proceeding. On June 7, 1913, Kornmeyer conveyed the property by

¹Reported in 177 Pac. 676.

warranty deed to one Strong, who, on August 30, 1913, conveyed the premises by warranty deed to one Katsel. Katsel, on August 28, 1914, conveyed the premises to the respondent by quitclaim deed, which was recorded on September 2, 1914. This quitclaim deed was given to secure advances which respondent had made for the payment of taxes, and the payment of delinquent installments of principal and interest on the first mortgage. These payments were made by the respondent in order to protect its second mortgage.

At the time the quitclaim deed was made by Katsel, respondent gave back to him a written agreement to reconvey the property to him upon the refunding by him of the advances just referred to. In legal effect, this deed amounted, therefore, to a third mortgage. This instrument was recorded on April 2, 1915. On December 16, 1914, after having quitclaimed to the respondent, Katsel assigned to one Grube all his right, title and interest in the premises, which amounted to a transfer of the respondent's agreement to reconvey upon the repayment of advances made by it. During Grube's ownership he reduced the amounts due upon both the first and second mortgages and satisfied the advances previously made by the respondent. These reductions left the total indebtedness on both the first and second mortgages in the sum of \$5,002.82. Grube received from the respondent a quitclaim deed, as had been provided for in the Katsel agreement. This instrument was dated September 1, 1914, and ran from the respondent to Grube. It was never recorded while in the possession of Grube, but, as we will subsequently show, became the deed from the respondent to appellant Demick. February 11, 1915, Grube and the appellant Demick entered into a written agreement for the transfer to Demick of this property, subject to the

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mortgage indebtedness, the agreement providing that Grube was “—to convey by quitclaim deed through the Connecticut Investment Company” to Demick the property in question, subject to a mortgage debt of \$5,002.82. After this agreement had been signed by both the parties, Grube produced the unrecorded deed from the respondent to himself, and he and Demick went to the respondent’s office and there the name of Grube, as grantee, was erased from the deed and Demick’s name was substituted, this being done to save the expense of recording two deeds and the abstract expense connected therewith. This deed, therefore, bore date of September 1, 1914, although the transfer to the appellant Demick took place early in 1915 and the deed was recorded on April 2, 1915. In the deed from Kornmeyer to Strong and from Strong to Katsel, as before indicated, the grantees assumed and agreed to pay the first, or New World Life Insurance Company’s mortgage, as well as the second mortgage now being foreclosed, but in the deeds from Katsel to respondent and from respondent to Demick, no mention is made of this second mortgage. The testimony shows, however, that Demick understood that there were two mortgages upon the property and agreed to assume both of them, stating in his agreement their totals. That he so understood is proved by testimony in addition to that furnished by the agreement itself. Demick neglected to make these mortgage payments, and it was when they had become in default, Demick, on May 19, 1917, gave a mortgage to the appellant Muller, this mortgage being given to secure a pre-existing obligation between Demick and Muller.

The contention of the appellant Demick is that, by the assignment of the mortgage to the respondent and the quitclaim deed from Katsel to the respondent, the

entire title to the property being thereby vested in one person, the lesser title, that is, the mortgage, became merged in the greater and the mortgage was thereby extinguished, and that the respondent, by its deed to Demick conveying all his right, title and interest, included thereby whatever interest it may have had at any time in the mortgage as a lien upon the property. Was there a merger of the legal and equitable titles? That such merger can exist, there is no question, for it has been so decided in this court: *Chase Nat. Bank v. Hasting*, 20 Wash. 433, 55 Pac. 574; *Tolsma v. Adrian*, 32 Wash. 383, 73 Pac. 347; *Summy v. Ramsey*, 53 Wash. 93, 101 Pac. 506.

But the facts in the instant case do not bring it within the operation of the rule announced in those decisions, for here we have an express agreement that the second mortgage, that is, the respondent's, should remain in force, as is witnessed by the written agreements between the respondent and Grube, between Grube and Demick, and by the oral agreement made at the time the deed was changed and Demick's name substituted as grantee, this being testified to by numerous witnesses. Demick's agreement to make payments on the mortgage after the quitclaim deed had been given to him bears witness to the fact that he understood and recognized the second mortgage as being still in force. The courts hold, under some circumstances, that the legal and equitable title are merged, but they recognize no such merger contrary to the understanding and agreement of the parties interested in the title. *Hitchcock v. Nixon*, 16 Wash. 281, 47 Pac. 412; *Stewart v. Eaton*, 20 Wash. 378, 55 Pac. 314; *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147; *Bunger v. Pruitt*, 73 Wash. 569, 132 Pac. 237.

An inquiry into the circumstances with the idea of determining whether a merger was intended by the

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parties, which inquiry is always made in such cases, shows that the parties had no idea that a merger had taken place, or was to take place. We are satisfied that the appellant Demick never anticipated that he was obtaining title to this property freed from the second mortgage, and his present claim is palpably an afterthought, the result of his present desire and not of his past agreement, and rests for its support upon the confusion which exists in the record of the title to this property, due to the numerous deeds, agreements and instruments, which were exchanged with considerable frequency and more irregularity. We have attempted in the statement of the case to refer only to those instruments which, in our judgment, have any bearing on the issues here presented. The record discloses, however, that there were additional transfers of title, which are confusing but immaterial to the present inquiry.

The claim of the appellant Muller can have no priority over the respondent's mortgage, although he asserts that he is entitled to priority because he relied on the respondent's quitclaim deed as releasing its second mortgage to Demick. This situation can avail him nothing, for the reason that his mortgage was taken for an indebtedness which existed prior to the deed and the incidents connected with this case, and there was no consideration for his mortgage other than such preexisting indebtedness or obligation. Under our decisions, he is not a *bona fide* holder for value. *Hicks v. National Surety Co.*, 50 Wash. 16, 96 Pac. 515, 126 Am. St. 883; *Thomas v. Grote-Rankin Co.*, 75 Wash. 280, 134 Pac. 919.

Judgment affirmed.

MAIN, C. J., CHADWICK, MITCHELL, and TOLMAN, JJ.,
concur.

[No. 14989. Department One. January 10, 1919.]

L. L. TERPENING, *Appellant*, v. LATEN BEACH, *Executor etc., et al.*, *Respondents*.¹

WILLS (7) — TESTAMENTARY CAPACITY — EVIDENCE — SUFFICIENCY. Want of testamentary capacity to execute a will is not shown, as against the positive testimony of the subscribing witnesses, by the evidence of one witness tending to show incompetency prior to the day on which the will was executed, such witness testifying that he was rational on that day.

Appeal from a judgment of the superior court for Pend Oreille county, Carey, J., entered February 21, 1918, upon findings in favor of the defendants, dismissing a will contest, tried to the court. Affirmed.

E. M. Heyburn, for appellant.

Chas. H. Leavy, for respondents.

MAIN, C. J.—This action was brought for the purpose of contesting a will. The defendants answered, denying the matters alleged in the complaint. In due time the cause came on for trial before the court sitting without a jury. At the conclusion of the plaintiff's evidence in chief, the defendants challenged the sufficiency thereof to sustain the allegations of the complaint and moved for a dismissal. This motion was sustained and a judgment of dismissal entered. The plaintiff appeals.

The appellant is a nephew of the testator. The respondents are beneficiaries under the will. The testator died in Pend Oreille county on December 25, 1916. The will was admitted to probate on the fifth day of February, 1917. The testator, after directing that all his just debts be paid, devised and bequeathed all of his property, both real and personal, share and

¹Reported in 177 Pac. 674.

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share alike, to the respondents, Laten Beach and Inga Beach, his wife.

The issue presented by the complaint and answer was whether the testator was competent to make the will at the time of its execution. As a part of the appellant's case in chief, he called the two subscribing witnesses to the will, who apparently were men of good standing in the community, and each of them testified positively and unequivocally that the testator, at the time of making the will, was competent. No other witnesses were present at this time or testified impeaching the competency. One witness, who lived in the vicinity and had taken care of the deceased a portion of the time during his last illness, but who had not seen him for several hours prior to the execution of the will or for several hours subsequent thereto, testified that the testator was rational on the morning of the day the will was executed. This witness gave some testimony which would tend to show incompetency at times when he had seen the testator prior to the morning of the day on which the will was executed. The record contains no evidence that would justify an overturning of the will.

The judgment will be affirmed.

MITCHELL, MACKINTOSH, CHADWICK, and TOLMAN,
JJ., concur.

[No. 14994. Department One. January 10, 1919.]

PUGET SOUND BRIDGE & DREDGING COMPANY, *Plaintiff*,
v. INDUSTRIAL INSURANCE COMMISSION,
Defendant.¹

MASTER AND SERVANT (20-1)—WORKMEN'S COMPENSATION ACT—ADMIRALTY JURISDICTION. The workmen's compensation act, Rem. Code, § 6604-1 *et seq.*, does not apply to workmen employed exclusively upon a dredge at work in the navigable waters of the state subject to admiralty jurisdiction; but it applies to employees of the dredger who are engaged solely on the land; and as to employees engaged partly on the land and partly on the dredge, the industrial insurance commission is entitled to collect premiums in proportion to the time spent in either employment, so far as the same can be segregated and determined.

Cross-appeals from a judgment of the superior court for Thurston county, Wright, J., entered June 7, 1918, favorable to the plaintiff, in an action to enjoin the collection of premiums under the workmen's compensation act, tried to the court. Affirmed.

Roberts, Wilson & Skeel, for plaintiff, contended, among other things, that the status of the men working both on the dredge and land, should be fixed from the nature of their work, which is maritime. *Southern Pacific Co. v. Jensen*, 244 U. S. 205; *Stoll v. Pacific Coast Steamship Co.*, 205 Fed. 169.

A dredge is a vessel and subject to the admiralty jurisdiction. *The Alabama*, 22 Fed. 449; *The Pioneer*, 30 Fed. 206; *Atcheson v. Endless Chain Dredge*, 40 Fed. 253; *The Atlantic*, 53 Fed. 607; *The Starbuck*, 61 Fed. 502; *In re Hydraulic Steam Dredge No. 1*, 80 Fed. 545; *McRae v. Bowers Dredging Co.*, 86 Fed. 344; *McMaster v. One Dredge*, 95 Fed. 832; *Bowers Hydraulic Dredging Co. v. Federal Contracting Co.*, 148

¹Reported in 177 Pac. 788.

Fed. 290; *Bowers Hydraulic Dredging Co. v. Federal Contracting Co.*, 153 Fed. 870.

Where a vessel is within the admiralty jurisdiction it is not subject to the workmen's compensation act. *Shaughnessy v. Northland Steamship Co.*, 94 Wash. 325, 162 Pac. 546, Ann. Cas. 1914B 655; *State ex rel. Jarvis v. Daggett*, 87 Wash. 253, 151 Pac. 648, L. R. A. 1916A 446; *The Fred E. Sander*, 208 Fed. 724; *The Fred E. Sander*, 212 Fed. 545; *Workman v. New York City, Mayor etc.*, 179 U. S. 552.

The Attorney General and *John A. Homer, Assistant*, for defendant, contended, *inter alia*, that dredgers without propellers, connected to the shore by wires and floating pontoons, do not fall within the admiralty jurisdiction. *West v. Martin*, 51 Wash. 85, 97 Pac. 1102, 21 L. R. A. (N. S.) 324; *The Senator Rice*, 234 Fed. 101; *The Big Jim*, 61 Fed. 503; *The Pile Driver E. O. A.*, 69 Fed. 1005.

Were it otherwise, the question of admiralty jurisdiction should be determined by the locality. 1 C. J. 1285; *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52; *The M. R. Brazos*, Fed. Cas. No. 9898; *The Mackinaw*, 165 Fed. 351.

It is competent for the legislature to extend the workmen's compensation act to actions arising in admiralty jurisdiction. *The Hamilton*, 207 U. S. 398; *La Bourgogne*, 210 U. S. 95; *The J. E. Rumbell*, 148 U. S. 1; *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. (53 U. S.) 299; *Ex parte McNiel*, 13 Wall. (80 U. S.) 236.

Congress had power to legislate on this subject, and the effect of the Congressional amendment of October 6, 1917, is to modify or control the decisions restricting the application of the workmen's compensation act in this respect. *Providence of New York*

Steamship Co. v. Hill Manufacturing Co., 109 U. S. 578; *In re Garnett*, 141 U. S. 1.

Admiralty jurisdiction does not extend to employment even of a maritime nature upon the shore or dock, and consequently the decisions of the *Jarvis*, *Shaughnessy* and *Jensen* cases, if not controlled by the Congressional amendment, would not apply to the shore employment. *The Bee*, 216 Fed. 709; *Swaine & Hoyt v. Barsch*, 226 Fed. 581; *The Albion*, 123 Fed. 189; *The Plymouth*, 3 Wall. (70 U. S.) 20; *Cleveland Terminal & Valley R. Co. v. Cleveland Steamship Co.*, 208 U. S. 316; *Johnson v. Chicago & Pacific Elevator Co.*, 119 U. S. 388; *Southern Pacific Co. v. Jensen*, 244 U. S. 205.

MACKINTOSH, J.—The plaintiff is engaged in the work of dredging upon the navigable waters within the state of Washington. It carries on this work by means of hydraulic dredges, taking material from the beds of the navigable waters and, after conveying it through pipes, discharging it upon adjacent lands. In this work it employs three classes of employees; first, those who work continuously upon the dredge and whose employment is entirely upon that vessel; second, those who work wholly upon the land and are at no time called to go upon the vessel; and third, those who work partly upon the vessel and partly upon the land and, during the day's work, go back and forth from one to the other, and who, in passing from the dredge to the land and from the land to the dredge, sometimes use rowboats, and at other times walk upon the pontoon pipes connecting the dredges with the land.

The industrial insurance commission, the defendant in this action, claims that all employees of the plaintiff are subject to the workmen's compensation act (Laws 1911, p. 345; Rem. Code, § 6604-1 *et seq.*), and

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that premiums should be paid on account of the work of all the employees engaged in dredging operations.

As to those employees who work exclusively upon the dredge, we are firmly of the opinion that the plaintiff should pay no premiums; for the dredge, as a vessel, is subject to admiralty jurisdiction, and if premiums were paid for employees engaged exclusively thereon, the company, in the event of an injury occurring to one of such employees, would receive no protection under the act. *State ex rel. Jarvis v. Daggett*, 87 Wash. 253, 151 Pac. 648, L. R. A. 1916A 446; *Shaugnessy v. Northland Steamship Co.*, 94 Wash. 325, 162 Pac. 546, Ann. Cas. 1918B 655; *Southern Pac. Co. v. Jensen*, 244 U. S. 205, Ann. Cas. 1917E 900, L. R. A. 1918C 451. The fact that Congress, on October 6, 1917 (Act Oct. 6, 1917, c. 97, §§ 1, 2, 40 Stat. 395 [U. S. Comp. St. 1918, §§ 991 (3), 1233]), amended (by adding the italicized portion) §§ 24 and 256 of the Judicial Code of the United States (Act March 3, 1911, c. 231, 36 U. S. Stat. at Large, 1091, 1160) relating to the jurisdiction of Federal district courts in admiralty, and providing that Federal courts should have jurisdiction "Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any state," does not change the rule of these cases and extend to the industrial insurance commission jurisdiction of persons engaged in maritime work, for the reason that the workmen's compensation act of this state withdraws all "remedy of workmen against employers for injuries received in hazardous work from private controversy" and excludes "every other remedy," and therefore the Federal act cannot create a liability where one already exists in admiralty.

The second class of workmen, employed solely upon the land, comes within the operation of provisions of this act, and for them premiums are collectible.

As to the third class, we are confronted by the perplexing question of this case. The workmen's compensation act was passed with the avowed purpose of providing the exclusive manner of compensating employees engaged in hazardous work and occupations, and, within the scope of the act, all employees of a company such as the plaintiff are to be brought within the operation of that act, so far as it is within the power of the legislature to do so. The legislature, not bringing within the act those employees who are within the jurisdiction of admiralty, cannot compel the employer to pay premiums for those employees for whose injuries the employer would be liable in admiralty. On the other hand, the employer is not absolved from the duty of paying premiums for those employees who are not within the admiralty jurisdiction and for whose injury the employer would have been liable in a suit at common law before the passage of the workmen's compensation act. It may be, as here, that it would be an onerous task to so segregate, for the purpose of computing the premium to be paid, the time of employees who are alternately on land and on the navigable water, but this is a matter of detail of the business which must be worked out by the employer and the commission, and is not one which calls for judicial action. If this segregation is impracticable, the remedy must lie in some alteration of the act by the legislature.

As to those employees falling within the third class, the industrial insurance commission is entitled to a collection of premiums for such time as those employees are engaged in work upon the land, and is not entitled to receive premiums representing the time

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that they are without the protection of the act and subject to the rules of admiralty jurisdiction.

The decision in the recent case of *Spokane & Inland Empire R. Co. v. Wilson*, 104 Wash. 171, 176 Pac. 34, in nowise conflicts with the views here expressed, for we there held that the workmen's compensation act, as it relates to railroad companies a part of whose business is interstate, exempted such company from the operation of the act, and the question as to whether the employees were sometimes engaged in interstate and at others in intrastate commerce was not material, for the reason that the status of the railroad company, as being one partially engaged in interstate commerce, determined the question of the liability of the company for premiums under the state workmen's compensation act, for its employees.

The judgment of the lower court will be affirmed.

MAIN, C. J., TOLMAN, and MITCHELL, JJ., concur.

[No. 14996. Department One. January 10, 1919.]

F. E. LANGFORD, *Appellant*, v. FRED PRINGLE,
Administrator etc., Respondent.¹

ATTORNEY AND CLIENT (44)—COMPENSATION—PERFORMANCE OF SERVICE—EVIDENCE—SUFFICIENCY. In an action to recover attorney's fees agreed to be paid in the sum allowed by the court for the foreclosure of mortgages, evidence to the effect that the mortgagee was to be given a little time in case he was compelled to bid in the property, does not warrant denial of recovery for the full amount.

EVIDENCE (153)—PAROL TO VARY WRITING—RECEIPTS. A receipt is not a written contract within the rule against parol evidence, and may be explained or contradicted by parol.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered March 30, 1918,

¹Reported in 177 Pac. 731.

upon findings in favor of the defendant, in an action on contract, tried to the court. Reversed.

Lucius G. Nash, for appellant.

Rosenhaupt & Grant, for respondent.

MITCHELL, J. — George Pringle, in his lifetime, through an agent, employed appellant as an attorney to foreclose certain mortgages and to transact other legal business for him. His compensation in each of the mortgage foreclosure cases was to be the same as the amount which the court should fix as a reasonable attorney's fee in the decree of foreclosure, under the terms of the mortgage, provided, however, there was to be an advance partial payment in cash of \$25 on each of such attorney's fees.

Appellant conducted six foreclosure suits wherein varying amounts, determined reasonable attorney's fees, totaled \$1,000. He was paid \$25 at the commencement of each suit. In addition to the foreclosure suits, he conducted a writ of assistance proceeding against a tenant of one of the properties at the agreed price of \$50.

George Pringle died, and respondent, Fred Pringle, was appointed and qualified as administrator of his estate. Appellant presented his duly verified creditor's claim in the sum of \$1,050, credited by \$150, to the administrator, who disallowed it. Appellant sued, and the superior court, on the trial, made findings and entered judgment allowing balance due on fees claimed in four of the foreclosure suits in the sum of \$500, but denied the claim for balance due on fees in the other two foreclosure suits in the sum of \$350, and also denied the fee for the writ of assistance case in the sum of \$50. Exceptions were taken by appellant to ad-

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verse findings, and this appeal is prosecuted to recover the full amount sued for.

The only witnesses at the trial were appellant and Fred K. McBroom, who had acted as agent for George Pringle. At the time of placing the first of the mortgages with appellant for suit, there was some talk, not amounting to a definite understanding, between him and McBroom, the agent, for leniency on appellant's part as to the time of payment of fees, other than the nominal cash payment of \$25, to the effect that the balance of the fees would be paid when the property involved, or some of it, was sold to a person other than Pringle, or redeemed, so as to save Pringle, a money lender, from advancing what was spoken of as new or live money. Pringle became the purchaser at each of the foreclosure sales. In those cases in which the court disallowed appellant his fees, it does not appear that Pringle ever realized any cash from a redemption sale or trade of the properties involved and which had been purchased by him at sheriff's sale. There was no question as to the amount appellant was entitled to, only he was not yet entitled to recover as the court understood the contract. An examination shows the trial court's finding was contrary to the evidence. Appellant's understanding was the same as that of McBroom, who testified as follows:

"A. He was to get \$25 and we were to pay the costs, and in the final settlement he was to get the attorney's fee provided in the mortgage or allowed by the court; I assume the court would allow the attorney's fee provided in the mortgage; that is what he was to get. Q. No more and no less? A. That is what he was to get. Q. When was he to get this? A. Well, he was to get it as soon as we got around to pay it to him and we were going to stand him off as long as we could, unless we disposed of the property, unless the property was redeemed or paid, we would pay him. Q. Then,

as a matter of fact, it was simply giving Mr. Pringle a little time to pay these amounts of attorney's fees? A. That is what it amounted to. Q. That is all it amounted to? A. Yes."

The court further decided that appellant could not recover on two of his charges because of receipts he had given purporting to be in full for services in those cases. In the first place, counsel for respondent at the trial admitted the amounts of the fees were correctly alleged, while his answer contains no affirmative plea of payment. Again, the receipts are explained as being "in full" only for the advance or nominal fee of \$25, by both witnesses. Mr. McBroom's testimony as to each was as follows:

"Q. Did you know that on one of those receipts it said 'in full' at the time it was executed? A. No, I see it now, but I do not remember ever noticing that at all, but that is what it meant, it meant in full according to our agreement, cost and \$25."

Respondent contends that the evidence explaining the receipts was inadmissible as varying the terms of a written contract. Such is not the law. A receipt is not a contract, and even if it purports to be in full of all claims and demands, it is not conclusive to that effect and parol evidence is admissible to explain or even contradict it. *Allen v. Tacoma Mill Co.*, 18 Wash. 216, 51 Pac. 372; *Gronning v. Elliott Bay Mill & Lumber Co.*, 61 Wash. 676, 112 Pac. 937; *Phelps Lumber Co. v. Bradford-Kennedy Co.*, 96 Wash. 503, 165 Pac. 376.

As to the fee for conducting the writ of assistance proceeding, appellant, during the trial of the present case, was on the witness stand twice, and each time testified there was a direct and positive understanding with Mr. McBroom, as agent, that such fee should be paid. This was not denied in any way, although

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Mr. McBroom was present at the trial. Appellant is entitled to recover the whole amount sued for.

The cause is remanded with directions to the lower court to enter judgment accordingly.

MAIN, C. J., MACKINTOSH, TOLMAN, and CHADWICK, JJ., concur.

[No. 14998. Department Two. January 10, 1919.]

GUST CULES, *Appellant*, v. NORTHERN PACIFIC RAILWAY
COMPANY, *Respondent*.¹

MASTER AND SERVANT (54, 57)—INJURIES—METHODS OF WORK—SIGNALS—LOADING CARS—NEGLIGENCE OF FELLOW SERVANTS. Under the Federal Employers' Liability act, it is actionable negligence upon the part of fellow servants, engaged in loading rails by pushing them up skids, for part of the crew at one end to disregard signals and fail to wait for the final signal calling for concerted action, whereby, through their hasty action, the other end slipped back and injured a member of the crew.

SAME (20-2)—INJURY—FEDERAL LIABILITY ACT—FELLOW SERVANTS—STATUTES. The effect of section 1 of the Federal Employers' Liability act (U. S. Comp. St., § 8657) is to abolish the doctrine of nonliability for the negligence of fellow servants engaged in interstate commerce and to put negligence on the part of fellow servants on a par with negligence of the master; and this, regardless of the other sections of the act relating to contributory negligence and assumption of risks; since a servant does not assume the risks of negligence of a fellow servant where the act was not habitual or usual.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 16, 1918, upon granting a nonsuit, dismissing an action for personal injuries sustained by a railroad laborer. Reversed.

¹Reported in 177 Pac. 830.

Geo. H. Rummens and Frank E. Green, for appellant.

C. H. Winders, for respondent.

FULLERTON, J.—The appellant, a track laborer in the employ of the respondent, received personal injuries while engaged with other workmen in loading steel rails upon a flat car. It is conceded that the respondent was a common carrier of interstate commerce by railroad, and that the work in which the appellant was engaged was in the prosecution of the carrier's business as such an interstate carrier. The appellant brought this action under the Federal employers' liability act (Act April 12, 1908, c. 149, 35 U. S. Stat. at Large, p. 65 [U. S. Comp St., §§ 8657-8665]) to recover for his injuries. At the trial of the case at the close of his evidence in chief, the respondent interposed a challenge to its legal sufficiency, which challenge the trial court sustained, entering a judgment dismissing the action. The appeal is from this judgment, the question presented being the sufficiency of the evidence to make a case for the jury.

While the witnesses vary somewhat in the details of their testimony, there is no substantial conflict between them as to the manner and cause of the accident giving rise to the injury. The process of loading the rails was this: Skids were inclined from the ground to the top of the car. A rail would then be moved from the pile in which it was located to the foot of the skid, when the workmen would take hold of it with their hands and slide it on the skids to within two or three inches of the top, where a pause would be made. This pause was for the purpose of obtaining concerted action in the final push which landed the rail on the car, it being desirable if not necessary to the safety of the workmen, that the rail be pushed over the end

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of the skids onto the car at practically the same moment. Concert of action for the final push was obtained by the use of signals given by one of the workmen selected for the purpose. The signals were two in number, the one a warning signal for the workmen to get into position for the final push, and the second one for the concerted push which placed the rail over. At the time of the accident, the appellant was stationed at the extreme left of the group of workmen and beyond the skid on that side. When the rail then being raised was near the top of the skids, the workmen stopped its progress to await the signal from the workman in charge. The preliminary signal was given, when the workmen on the end of the rail opposite the appellant, without waiting for the second signal, pushed their end of the rail over onto the car. This act caused the rail to turn over and caused the appellant's end to slide backward upon the skid next to him. In so sliding, the third finger of the appellant's right hand was caught between the rail and the skid and cut off at the second joint.

There is some evidence in the record to the effect that occasionally, when the final signal was given, the workmen at one end of the rail would push that end of the rail over the end of the skid ahead of the workmen at the other end, but it was not in evidence that this fact ever resulted in injury, or was liable to cause injury, to the workmen on the other end. Neither was there any evidence that it was customary or usual for one side to push the rail over on the giving of the first signal, or any evidence that such a thing had occurred in the loading of this car, other than in the instance in which the appellant was injured.

The trial judge in sustaining the challenge to the sufficiency of the evidence rested his conclusion on the

decisions of this court in the cases of *Anderson v. Oregon R. & Nav. Co.*, 28 Wash. 467, 68 Pac. 863, and *Swanson v. Oregon-Washington R. & Nav. Co.*, 92 Wash. 423, 159 Pac. 379, remarking that he was unable to distinguish them from the case at bar. But these cases, it seems to us, while similar in their facts to the case under consideration, presented entirely different questions. The first was a common law action for personal injuries, brought prior to the enactment of the Federal employers' liability act, in which the fellow servant doctrine was in full force and effect. The injured plaintiff sought to escape the fellow servant rule by contending, first, that the common employer undertook to superintend the work and that his injury was the result of a negligent performance of the undertaking; and second, that the work was of such a complicated and dangerous character as to make it the nondelegable duty of the common employer to superintend it, and hence his liability if the injury was the result of negligence or want of proper superintendence of the work, even though the employer did not undertake to superintend it. The court denied these contentions, holding that the injury was the result of negligence on the part of a fellow servant for which the employer was not liable. The second case, though brought under the Federal act, was held not to fall within it. While facts were alleged tending to show that the employer was engaged in interstate commerce and that the injury was received while the injured party was employed therein, because of the negligence of a fellow servant, the court dismissed this branch of the case with the remark that there was no evidence to sustain it, discussing only the ground of complaint that the injured workman had not been sufficiently warned of the dangers attendant upon the

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work. Plainly, therefore, the cases are not decisive of the questions presented by the present record. These questions are two, namely, was the appellant's injury the result of actionable negligence on the part of his fellow servants, and, if so, is the common employer liable under the Federal employers' liability act to answer for the injury; neither of which was present in the cited cases.

Passing then to the first of the questions suggested, we think it clear that the injury was the result of a negligent act on the part of the appellant's coemployee. The work in which the workmen were engaged was not work which could be performed by the workmen acting singly. The rails could not be so placed upon the car. Concert of action was thus not only necessary for the successful performance of the work, but was necessary, owing to the cumbersome nature of the material being loaded, to secure the safety of the workmen engaged in it. When, therefore, the men agreed upon a line of action and proceeded with the work in pursuance of the agreement, any departure therefrom by any number of the workmen would be a negligent act, whether wilfully or heedlessly performed, giving a workman injured thereby a right of action against them to recover for such injury; this on the principle that they failed to exercise that degree of care which ordinary prudence required of them under the given circumstances.

It is perhaps unnecessary to cite cases in support of the foregoing conclusion, but acts of a coworkman similar to the act in question were held to be negligent in *Cherpeski v. Great Northern R. Co.*, 128 Minn. 360, 150 N. W. 1091; *Janssen v. Great Northern R. Co.*, 109 Minn. 285, 123 N. W. 664, and *Meo v. Chicago & N. W. R. Co.*, 138 Wis. 340, 120 N. W. 344; and infer-

entially so held in *Truesdell v. Chesapeake & O. R. Co.*, 159 Ky. 718, 169 S. W. 471.

The liability of the common employer to answer for the injury depends upon the effect that is given to the Federal employers' liability act (Act of Congress, April 12, 1908, c. 149). The applicable provisions are §§ 1, 3 and 4 thereof. These read as follows:

"Sec. 1. Every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Sec. 3. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

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"Sec. 4. In any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 35 U. S. Stat. at Large, pp. 65, 66 (U. S. Comp. St., §§ 8657-8665).

The effect of the first section is to abolish, in this class of cases, the common law doctrine of nonliability on the part of the master for injuries arising to one of its servants by the negligent act of another, not participated in nor sanctioned by the master. It is also applicable to the appellant's situation. The respondent is a common carrier by railroad, engaging in interstate commerce. The appellant was one of its employees and suffered an injury while so employed in such commerce, resulting from an act of negligence of other employees of such carrier. Seemingly, therefore, if this section of the act is to be given effect as written, there can be no escape from the conclusion that the facts of the present case, as presented at the time the challenge to the evidence was interposed, showed *prima facie* a liability on the part of the respondent.

But it is said that this section must be read and construed in connection with the other sections quoted, and, when so read and construed, the conclusion is sustained that no liability was established by the evidence. But it is difficult to see what bearing the quoted sections can have on the question as here presented. The first section of the act deals with that branch of the law of personal injury known as the fellow servant rule, while the other sections deal with separate and distinct branches of the same law,

namely, the branches described by the phrases "contributory negligence" and "assumption of risk." In the third section it is provided that contributory negligence on the part of the injured employee shall not constitute a bar to a recovery, but that his damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee. Under it, perhaps, where the negligence was slight and the contributory negligence gross, the jury might be warranted in finding nothing more than nominal damages, but it is a question for the jury nevertheless; the court has no warrant to take the case from the jury because of the injured employee's contributory negligence. The fourth section merely provides that the injured employee shall not be held to have assumed the risk of his employment in any case where the violation by the employer of any statute enacted for the safety of the employee contributed to the injury of the employee. Undoubtedly this section leaves open to the employer the defense of assumption of risk in all cases in which the defense is applicable, save only where its own violation of some of the safety appliance acts has contributed to the injury. But plainly this cannot avail the respondent in the present case unless it is to be held that an employee assumes the risk of negligence on the part of his coemployees. Such, however, is not the general rule. The courts, with almost entire unanimity, hold that an employee does not assume the risk of negligence on the part of his fellow employee. An exception is made in some of the courts, particularly the Federal courts, where the negligence of the fellow employee is habitual or usual and the injured employee knew, or by reasonable diligence ought to have known, of the negligence. But even this modification is not available as a defense

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in this action. As we have indicated, the evidence before us fails to show that the negligent act causing the injury was habitual or usual.

But the respondent argues, if we have correctly gathered its purport, that the highest Federal court had held that an employee assumes the risk of injury from the negligent acts of his fellow employees. The case cited as supporting the point is *Boldt v. Pennsylvania R. Co.*, 245 U. S. 441. In that case the plaintiff's intestate, an experienced yard conductor, was killed by what was alleged to be the negligent act of a fellow employee. At the trial upon the facts the plaintiff requested the court to charge the jury that "the risk the employee now assumes, since the passage of the Federal employers' liability act, is the ordinary dangers incident to his employment, which does not include the assumption of risk incident to the negligence of the carrier's officers, agents or employees." The trial court declined to so charge, and the case was before the appellate court on the single question whether or not there was error in refusing to give the instruction. The court held that the instruction was properly refused, and while we confess to a difficulty in gathering from the opinion the precise grounds upon which the ruling was rested, it is inferable that it was rested upon the exception to the general rule before stated, namely, that the act of negligence complained of was obvious and fully known to the employee. It is true that, in the concluding paragraph of the opinion, the court says that the request did not accurately state any applicable rule of law, and further, that the "risk held to have been assumed in the *Horton Case* [*Seaboard Air Line R. v. Horton*, 233 U. S. 492, Ann. Cas. 1915B 475, L. R. A. 1915C 1] from negligence of some officer, agent or employee;

and if the negligence of all these should be excluded in actions under the Employers' liability act it is difficult to see what practical application could ever be given in them to the established doctrine concerning assumption of risk." But that it did not mean by this to hold that an employee assumes in all instances the risk of injury from the negligent acts of his fellow employees is evident by an earlier part of the opinion. There the court quotes parts of § 1 of the act, and remarks that, in "cases within the purview of the statute, the carrier is no longer shielded by the fellow-servant rule, but must answer for an employee's negligence as well as for that of an officer or agent;" language that would have been inappropriate were it intended to be held that the risk is assumed in all cases. It is worthy of note that the construction we put upon the opinion is that put upon it by the writer of the head note thereto. (See first paragraph of the syllabus.)

In his brief, counsel for the respondent states:

"The Federal Employers' liability act, however, does not relieve a railroad employee from the burden of showing some negligence, nor cast upon the employer the burden of liability for accidents occurring in simple work. In fact, the supreme court of the United States has repeatedly held that negligence must be shown . . ."

If it be meant by this that the injured employee must show actionable negligence on the part of his fellow employee resulting in his injury before a recovery can be had against the common employer, then we agree with the statement; and we find, as we have heretofore attempted to demonstrate, that in this instance the injured employee did show such negligence. But if it is meant to be asserted that negligence on the part of the common employer must be

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shown in such a case before a recovery can be had against the employer, then we cannot follow counsel. It is our understanding that the very purpose of the liability act was to do away with the necessity of such showing; that its purpose was to create a liability on the part of a common employer in the respondent's situation for an injury caused to one of its employees by the negligent acts of another, regardless of whether it was itself guilty of negligence. Nor has our research enabled us to find any decision of the court mentioned holding as the respondent asserts. On the contrary, the very case cited recognizes the opposing principle, and as we read the case of *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, it holds in terms that the liability act abrogated the common law rule of fellow servant and placed negligence of a coemployee upon the same basis as negligence of the employer. In the inferior Federal courts are many cases allowing a recovery where the negligence causing the injury was the negligence of a fellow servant not participated in by the common employer.

It is true there is this distinction between the cases cited and referred to and the case at bar: In the cited cases, the injured workman and the workman negligent were in more or less disconnected employments, in which each employee could act separately and in which the employee had his work pointed out by the common employer — such, for example, as an engineer of a locomotive engine injured by the negligent act of a yard worker in failing to close an open switch; while, in the case at bar, the injured employee was acting in concert with his coemployees and doing work requiring their united efforts, the manner of doing which he had a part and parcel in framing. But it would seem that this difference in the facts could hardly make a differ-

ence in the principle involved. The work, as we have shown, was work requiring concert of action on the part of the workmen, a fact as well known to the master as it was to the workmen themselves. The appellant had no part in selecting his coworkers; he was obligated to work with those employed by the master, and it is not shown that he had warning that any of them were so reckless as not to be trusted to follow out the work on the plan agreed upon; nor was it shown that the plan of the work was in itself unusual or extraordinary. Since the master had the right and authority to superintend the work, and since it failed to exercise this right and authority, but entrusted the work to the workmen themselves, it would seem manifest that it cannot be heard to deny its liability merely because the manner of doing the work was not directed by it.

Our conclusion is that the court erred in sustaining the challenge to the sufficiency of the evidence. The judgment is reversed and the cause remanded for trial.

MAIN, C. J., PARKER, MOUNT, and HOLCOMB, JJ., concur.

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[No. 15009. Department One. January 10, 1919.]

W. R. THOMAS, *Respondent*, v. THOMAS B. MOORE *et al.*,
Appellants.¹

VENDOR AND PURCHASER (60, 61, 73)—RESCISSION BY VENDOR—FRAUD. Defendants may rescind the entire sale as a single transaction, where they were induced to sell by means of artifice and misrepresentation, and then, while dealings were in progress for the purpose of correcting misdescriptions, cancelled a mortgage and accepted another on worthless security; and it is immaterial that they were guilty of stupidity and dealt at arm's length, where they were imposed upon and lulled into a state of undue carelessness by artifice and the transaction was violative of good conscience.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered January 19, 1918, in favor of the plaintiff, in an action for rescission, tried to the court. Affirmed.

Ralph Kauffman and *Eugene E. Wager*, for appellants.

Carroll B. Graves and *John H. McDaniels*, for respondent.

MITCHELL, J.—Respondent, W. R. Thomas, was induced to make and deliver a deed of his farm, containing 1,280 acres, and a bill of sale of live stock and other personal property thereon to appellant Thomas B. Moore, to whom possession was delivered, in consideration of a relatively small cash payment, the remainder of the whole purchase price of \$75,000 to be paid in the future, for which security was to be given. Moore immediately, pursuant to agreement already made, and prior to taking actual possession, transferred a large portion of the personal property to appellant Honefenger, who, together with Moore,

¹Reported in 177 Pac. 734.

promptly marketed and removed most of the personal property so transferred to Honefenger, the value of which so disposed of by them was largely in excess of the cash payment that had been made to respondent. Shortly after the deal was put in final shape, information to respondent lead to an investigation which readily disclosed the apparent worthlessness of the security given respondent to protect the future payments due him. He conceived the idea he had been overreached in the transaction and promptly brought this suit to rescind the contract, for cancellation of the instruments of conveyance, and for an accounting. The superior court awarded to him all the relief demanded. Defendants, by appeal, present the cause to this court.

Numerous assignments of error are reducible to the contentions: First, that respondent being a person of ordinary intelligence and there being no confidential relation existing between him and Moore, that they were seller and buyer "at arm's length," thus placing the transaction beyond the interposition of equity; and second, that no fraudulent representations were made.

No good purpose can be served by referring to the large volume of evidence submitted, other than in a general way. An examination of it convinces us as it did the superior court.

As to the first claim, that respondent failed to show a cause for equitable relief, appellants overlook the well advised present day rule that a court of equity will not sanction transactions violative of good conscience and shocking to a sense of fair play, even though the victim is guilty of stupidity. The evil effects which sometimes flow from dealings commonly spoken of as having occurred when the parties were at arm's length are not only not repugnant to equita-

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ble cognizance, but often receive full relief and treatment in no other way, and the attempt to foreclose such jurisdiction upon the specious plea that the parties thus dealt with each other, takes for granted the very thing in dispute. It sometimes happens, as here, that, whatever may have been their relations at first, before final consummation of the transaction the party imposed upon has been deprived of his proper judgment and lulled into an undue state of carelessness by the artifice and designs of the other party. In the present case, the respondent—an unsuspecting, transient trader—was over-persuaded, in part by pictures of the wealth of the purchaser, and by the meager contents and extended time expressed in the mortgage given back, on the farm only, to secure deferred payments, while shortly and when dealings were still in progress between the parties by way of correcting some misdescriptions of property as given in the first deed and purchase-price mortgage, the appellant Moore, by misrepresentation, induced respondent to cancel the mortgage he already had and, in its stead, to take one upon other property already burdened to its full market value and in litigation. Upon this history of their dealings, counsel for appellants contend that the transactions, as they were when suit was commenced, were separable into two distinct and unrelated parts; and that, even if the final transaction resulted in a worthless security, it is unavailing to respondent in this action, under the rule that fraudulent misrepresentations to be actionable must have been made as to a present fact at the time of the deed. But, as we see it, counsel fail to give proper weight to the last act in this series of transactions which but completed a continuous scheme betraying the intentions of the buyer from the inception

of the deal. The rule of law controlling in this class of cases has been declared in *Mumford v. Smith*, 89 Wash. 98, 154 Pac. 153, and *Gordon v. Hillman*, 91 Wash. 490, 158 Pac. 96, and cases therein cited.

Upon the facts, altogether, it is enough to say we are satisfied that respondent met the burden imposed upon him to establish the allegations of his complaint by a preponderance of the evidence, and that the judgment as to an accounting is sustained by the evidence.

Judgment affirmed.

MAIN, C. J., MACKINTOSH, TOLMAN, and CHADWICK, JJ., concur.

[No. 15019. Department One. January 10, 1919.]

A. E. WILSON *et al.*, Respondents, v. JOHN F. MEARS *et al.*, Appellants.¹

CORPORATIONS (174)—CONTRACT WITH PROMOTERS—CONSTRUCTION—ADOPTION. Under a contract for the conveyance of land to promoters of a corporation, which provided that \$5,000 be paid by the issuance of stock, and that other stock issued to the promoters was to be placed in escrow as security for the balance due which was to be paid by the company, and that, if the balance was not paid when due, such stock was to be turned over to the vendors, it was the intention, on default, that the stock in escrow be delivered in payment for the land; hence a delivery according to the contract could not have been as security but was in payment of the contract, as adopted by the company.

SAME. In such case, where the company when organized adopted the promoters' contract, but failed, as it agreed to do, to pay the balance of the purchase price, which was paid by the delivery of the promoters' stock to the vendors, the promoters are entitled to be subrogated to the rights of the vendors against the company, had the vendors elected to waive the security and proceed against the company for the unpaid purchase price.

SAME. A promoter, who was manager and a heavy stockholder in a company organized to purchase and work a mining prospect, is not, on default of the company in payment of the price, liable

¹Reported in 177 Pac. 815.

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therefor, on the theory that the company having ability to pay, failed to do so, where the evidence failed to show that the company's stock had a market value, it had agreed not to sell its treasury stock, and its property had no real value except as a prospect; since in the absence of proof, it must be assumed that it defaulted in its obligations on account of lack of ability to pay them.

APPEAL (389)—REVIEW—AMENDMENTS. Upon appeal of a case tried to the court, where all the evidence was admitted, and brought up, all amendments to the complaint that could have been made will be considered as made, as directed by Rem. Code, § 1752.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered January 22, 1918, upon findings in favor of the plaintiffs, in consolidated actions for damages for fraud, tried to the court. Modified.

L. C. Jesseph, for appellants Mears *et al.*

Luby & Pearson, for appellants Hennessy *et al.*

Robertson & Miller and *Cordiner & Cordiner*, for respondents.

CHADWICK, J.—Appellants Mears were the owners of certain property in Stevens county, Washington. Valuable minerals had been discovered and the Mears had given respondent Strawhun an option to purchase the land.

Prior to the second day of November, 1916, Strawhun was engaged in the development of the property. Appellant J. J. Hennessy became interested and proposed to organize a company to take the property over and develop it. The parties, Mears, Hennessy and Strawhun, thereupon entered into a contract, the material parts of which follow:

“Whereas, a corporation is intended to be formed under the laws of the state of Washington, for the purpose, among other things, of securing said land

and the timber and minerals appurtenant thereto, and exploring and developing the same; and,

“Whereas, it is proposed that the nominal capital stock of said corporation shall be \$250,000, divided into 1,000,000 shares of the par value of 25c per share;

“Now, Therefore, It is hereby agreed as follows:

“(1) That the vendors shall sell, and the aforesaid corporation shall purchase, at a price of \$10,000, the said above described lands.

“(2) The consideration of the said sale and purchase shall be payable as follows, that is to say, the company shall immediately upon its incorporation issue to the vendor its capital stock to the amount of 50,000 shares, which shall be accepted by the vendors as a payment of \$5,000 on the purchase price of \$10,000; the balance of said purchase price to be paid in cash as follows: \$1,000 on or before the 1st day of March, A. D. 1917, and divided as follows: to J. Mears \$700; and R. Strawhun \$300; and \$4,000 on or before the 29th day of November, A. D. 1917.

“(3) Upon allotment of said shares of stock to the vendors, the vendors shall execute and deliver to the corporation a good and sufficient warranty deed, together with abstract showing marketable title in vendors.

“(4) Upon the adoption of this agreement by the corporation, the trustee shall cease to be in any way personally liable in respect to these presents or anything done or attempted to be done in the purchase thereof.

“It is agreed and understood by and between the parties hereto that upon the incorporation of said company the capital stock shall be divided as follows: 50,000 shares shall be allotted to the vendors, as hereinbefore stated; that Richard Strawhun, of Orient, Washington, claims an option on the herein described real estate and for his said option there shall be issued to him 200,000 shares, 100,000 shall be issued to the party of the second part; and as security for the payment of the balance of \$5,000 money payments payable on the 1st day of March, 1917, and the 29th day of November, 1917, party of the second part and the

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said Richard Strawhun hereby agree to deposit their 300,000 shares of stock of the proposed company in the Orient State Bank, the same to be delivered to the vendors upon the failure of the company to pay either of the money payments herein referred to at the time specified.

“Three hundred thousand shares of the capital stock shall remain in the treasury, intact, until such time as the cash payments are made.

"It is further understood and agreed by and between the parties hereto that the party of the second part shall have issued to him 350,000 shares of the capital stock of said proposed company as promotion stock for the purpose of financing said corporation.

"It is understood by and between the parties hereto that any ores taken or obtained from the herein described premises shall be shipped to a smelter for treatment, and that 40 per cent of the net smelter returns shall be paid over to the vendors and be applied on the money payments herein referred to, first on the \$1,000 until that is fully paid, and then on the balance of the \$4,000 payment. In the event that said 40 per cent of net smelter returns fully satisfied the money payments herein referred to prior to or at the date specified for payment, then and in that event only, the said 300,000 shares of stock shall be delivered over to second party and the said Richard Strawhun as their interests may appear."

The appellant company was organized and all the formal things required to be done by the contract were done. The company, however, did not meet the payment of \$1,000 due on March 1, 1917. Just prior to the first day of March, Hennessy wrote a letter to Mears, saying:

"Mr. J. F. Mears, Spokane, Wash., 3-1-17.

"Orient, Wash.

“Dear Sir: Owing to the fact that the F. H. & C. Gold Mining Company did not get sufficient ore out to ship to meet the payment of \$1,000 due you on the escrow agreement payable March 1st, 1917, therefore you are

privileged to take your stock out of escrow in said bank, as in accordance with the escrow agreement. I have no claim whatever on it. Only wish that we had got sufficient ore to meet the payment. This letter is not necessary as the agreement speaks for itself. However, thought I would notify you. And the certificate that is made out in my name for 100,000 shares is not signed by me on the back. I will sign when I get up. Or, if you will send it down to the office, 701 Hutton Block, I will sign and send it back. And if the certificate made in Strawhun's name is not signed on the back, you can see him then and have it signed by him.

“With kind regards to self and wife, I am,
Yours truly, J. J. Hennessy.”

Mears went to see Strawhun and they went together to the bank and took out the stock, which had been held by the bank in escrow under the terms of the contract. The stock certificates, being the 100,000 shares issued to Hennessy and the 200,000 shares issued to Strawhun, were turned over to Mr. Mears. Strawhun indorsed the certificate that had been issued in his name, and, after having them transferred on the books of the company, Mears sold the 300,000 shares for the sum of \$4,500, being less than the balance due on the purchase price of the land.

While the stock was held by the bank, Strawhun sold 50,000 shares to respondent Wilson to be turned over to him when the payments which the appellant company had assumed to pay had been made. After the sale of the stock by Mears, Strawhun and Wilson, each for himself, began an action to recover the value of the stock. Their complaints were drawn upon the theory of a conspiracy. They charged that the company had not mined the property in a diligent manner; that it had not shipped ore that might have been shipped and applied the proceeds to the payment of the purchase

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price, and that the company had fraudulently permitted the stock to be transferred on its books in disregard of the rights of the respective plaintiffs. The appellants answered, denying all charges of fraud and conspiracy and advanced the theory that there could be no recovery under the terms of the contract, relying upon that part of the contract which provides that any ores taken from the land should be shipped and forty per cent of the smelter returns should be paid to the vendors to be applied on the purchase price, the theory of appellants being that this part of the contract, which we have quoted above, provides that the payments were to be made only out of the smelter returns.

The cases were consolidated for trial; the testimony took a wide range. The charges of conspiracy and fraud were not sustained and, upon motion of counsel for the respondent, the court permitted a trial amendment. The case thereafter proceeded upon the theory that the stock had been deposited as security only and was not to be turned over by the bank to Mears, on default, in payment of the debt; that Strawn had agreed to the delivery of the stock by the bank upon the understanding that it was to be held by Mears as security, and that the sale of the stock without notice of sale was a conversion and made the appellant Mears liable under the rule announced in *Nagel v. Ham, Yearsley & Ryrie*, 88 Wash. 99, 152 Pac. 520; *Richardson v. Foster*, 100 Wash. 57, 170 Pac. 321.

Respondents sought to hold the company and Hennessy upon the theory—if we understand their present contentions—that, knowing of the contract and knowing that the stock was turned over to Mears as security only, the transfer of the stock on the books of the company was a conversion which would make the company and Hennessy jointly liable for the value of the stock.

We agree with counsel that the rights of the parties depend upon a construction of the contract. But we do not entirely agree with the construction of either party. Taking a broad and, at the same time, a common-sense view, as we believe, of the case, we find: that the Mears were the owners of the property and were to receive \$10,000 for it; they accepted 50,000 shares of the stock of appellant company in payment of \$5,000; \$5,000 was to be paid in cash, \$1,000 being due on the first day of March. The parties agreed in the contract that, if the payment was not made at that time, the stock should be turned over to Mears. No reservation was made by Strawhun or Hennessy, and, as we read the contract, it means no more than this: if the payment was not made at the time stipulated, the title to the land having been theretofore transferred to the company, the vendors were entitled to receive the stock in lieu of cash payments.

The theory of respondents that Strawhun consented to a delivery of the stock by the bank in order that Mears might hold it as security cannot be sustained. The legal relations of the parties were not changed. The stock *was* held by Mears, albeit the holding was through the agency of the bank, as security from the time the stock was issued. He could have done all that the respondents now insist that he ought to have done without a delivery of the stock. He could have made a sale upon notice or by action, and the bank would have been bound to deliver to the purchaser. So that the argument that the stock was turned over to Mears on March 1st to be held as security is of no weight in face of the fact that it was, at all times prior thereto, held by Mears as security for the debt which the company had agreed to pay and which Strawhun and Hennessy had underwritten.

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Coming back to the contract, the company which was organized accepted the contract as its own obligation. Strawhun became its surety because of his interest in the property under his option contract. The purchase price has been paid by the sureties. The company has in no way met its obligation, and the respondents Strawhun and Wilson are entitled to be subrogated in equity to the rights that Mears might have exercised if he had been content to waive his collateral security and bring suit against the company for the purchase price. The purchase price was paid by the sale of the 200,000 shares of stock owned by the respondents and the 100,000 shares owned by Hennessy, and it ought to follow that the respondents, they being the only ones seeking relief, should recover against the company for an amount in proportion as the amount paid by them bears to the whole purchase price. They paid no more than two-thirds of the purchase price, and the amount that they are severally entitled to recover against appellant company is: Strawhun, three-sixths, and Wilson, one-sixth, of the \$5,000.

We find no legal or even plausible ground upon which to base a judgment against Hennessy. The trial judge found that he was the active manager of the company; that the company, having the ability to pay, did not do so; that the failure to pay was on account of the machinations of Hennessy, and that his concurrence in the transfer of the stock on the books of the company made him liable. The only thing that might contribute to bring Hennessy in as a responsible party is the finding that the company, of which he was the active manager, did not pay the purchase price of the mine, having the ability so to do, but the record will not bear out such finding. The finding of the ability of the company to pay seems to have been based on the theory

that the property was worth \$10,000 and that there was no showing that it had depreciated in price; that Hennessy held 350,000 shares of stock as promoter's stock, and that there was 300,000 shares of stock in the treasury. The contract did not provide that the resources of the company should be exhausted as a condition precedent to the liability of the sureties. But there is no real showing of value; the property was no more than a prospect, and granting, in the absence of any testimony, that the stock had a market value and could have been sold, the company was not bound under its contract to sell its treasury stock; on the contrary, the agreement is to the effect that it will not do so. Strawhun made no provision against the default of the company. It must be kept in mind that the property had been deeded to the company. On default, Mears had the privilege of holding the company upon its primary obligation, treating the stock as collateral, or of taking the stock, at whatever value, in payment of the \$5,000 still due. When he accepted the stock, the company was released from its obligation to him. And its promise to sell the promoter's stock, which it had issued to its trustee Hennessy to meet the expenses of operation, became a matter of no concern to the other parties to the contract. The fact that the purchasers from Mears had fixed \$10,000 as a purchase price for the land would not even raise a presumption of any such value. Mining prospects have no market value, as farm lands and city property have. The value lies not in the certainty of a return of a fair interest or income, but in dreams and hopes. They are merely tables upon which cards are turned, and we are not disposed to hold that the prospect, which was the subject-matter of the contract, was a borrowing asset, as counsel would have us do.

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But if this reasoning be unsound, the company was managed by a board of directors, of which Hennessy was but one, and in the absence of proof that would lead to a contrary conclusion, we must assume that it did not meet its payment because it had no money, and had no way of raising money on the security it had to offer. In any event, there is no ground for entering a personal judgment against Hennessy, but the company will be held to the liability that it voluntarily assumed.

One of the errors assigned is that the court should not have permitted a trial amendment of the complaint to meet the proofs. We have not considered this assignment, and it may be said, if the court was in error, that we have likewise erred, for we have decided the case upon an entirely different theory. It seems to us that this is a case which peculiarly calls for the application of our statute, Rem. Code, § 1752, directing the court to "consider all amendments which could have been made as made." All of the testimony that could possibly be taken under any theory of the case has been taken and is before us. The ultimate rights of the parties depend not so much upon the evidence as upon a construction of the contract, and to the end that the case may be finally disposed of, we will treat the complaint as if it were a plea for equitable subrogation and give to respondents all that they could claim if the case were sent back to be tried over again upon any theory.

The case will be remanded with instructions to enter a judgment of dismissal in favor of Mears and wife; a judgment in favor of Strawhun for \$2,500, and a judgment in favor of Wilson for \$833.33; Mears and wife will recover costs against the respondents. The appellant company will recover costs in this court against respondents; it will pay the costs in the court

below. Appellant Hennessy will recover costs in this and in the court below.

MAIN, C. J., MACKINTOSH, TOLMAN, and MITCHELL, JJ., concur.

[No. 15031. Department One. January 10, 1919.]

SPOKANE UNION STOCKYARDS COMPANY, *Appellant*, v.
MARYLAND CASUALTY COMPANY, *Respondent*,
W. H. RALPH, *as Ralph Commission*
Company et al., Defendants.¹

PRINCIPAL AND SURETY (26)—DISCHARGE OF SURETY—CHANGE OF PARTIES. The surety upon a bond guaranteeing the contracts of an individual is discharged and not liable, where thereafter such individual entered into a partnership and the contracts sought to be enforced were made with the partnership.

SAME. The obligee on a bond taken to guarantee the contracts of an individual doing business under an assumed name is under some obligation to inform itself of the formation of a partnership which would discharge the surety as to contracts thereafter made; and cannot plead ignorance thereof, where it knew that the principal had entered into a partnership and failed to inform itself as to the extent of the partnership.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered May 31, 1918, upon findings in favor of the defendants, in an action on contract, tried to the court. Affirmed.

D. R. Glasgow, for appellant.

E. H. Belden, for respondent.

CHADWICK, J.—For some time prior to the 6th day of January, 1917, the defendant W. H. Ralph had been engaged in the business of buying and shipping cattle, through the Spokane Union Stockyards, Incorporated, at Spokane, Washington, under the name and style of the Ralph Commission Company.

¹Reported in 178 Pac. 3.

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To save the appellant from any loss by reason of advances made by it on account of the business of the defendant, it exacted a bond to save itself harmless in the event of the failure of the defendant to meet his obligations. The bond was executed by defendant, as principal, and the respondent, Maryland Casualty Company, as surety. At the same time and up to June 2d, 1917, one J. L. Stringfield was engaged in the business of buying cattle in the country and shipping them to the yards at Spokane. He was engaged, as we take it from the testimony, in what is called the "feeder" cattle business, and had done some business with Ralph to the knowledge of appellant. On the 2d day of June, Stringfield and defendant Ralph entered into a copartnership. No notice was given of the partnership, either by publication, by the filing of a certificate showing the names of the members of the copartnership, or by direct or actual notice to the managing officers of the appellant, or to the respondent. This partnership continued until the 14th day of August, 1917, when it was dissolved, and notice of such dissolution was published in a daily paper at Spokane.

Appellant brought this action to recover the sum of \$688.67, which it alleges, and the court found, that it had advanced for the account of the Ralph Commission Company. The respondent, casualty company, defended, setting up that Ralph and Stringfield had, after the time the bond was executed, entered into a copartnership and that all the business of the plaintiff had been conducted with the partnership since that time. All the items sued on postdate June 2d.

The court found that appellant had notice of this change, or, if it did not actually know of the partnership, it had sufficient knowledge and information of the dealings of Ralph and Stringfield to put it upon in-

quiry as to the nature and scope of the copartnership, and that, having such notice, either express or implied, it cannot recover upon the bond. The case is presented by appellant upon the theory that, if the appellant had no notice of the formation of a partnership between Ralph and Stringfield, respondent is liable. It is unnecessary to review the facts with reference to notice, for we are convinced that the judgment of the lower court should be sustained. The obligation assumed by the respondent was to meet certain defaults of defendant Ralph. The Ralph Commission Company is not mentioned in the bond. Ordinarily we assume that this would make no difference, but appellants knew of the trade-name under which Ralph did business, and having contracted with him, there was some obligation on its part to inform itself whether the Ralph Commission Company was, and continued to be, Ralph, individually.

The general rule is that,

“any material change in the obligation, whether prejudicial to the surety or not, will discharge him from liability . . . where there has been a release or change of principals. If a surety engages for an individual, the engagement is understood to extend to the acts of that individual alone, and will not continue if he takes in a partner; in other words, the surety for a single individual is not liable for a partnership of which such individual is a member.” 21 R. C. L. 1061.

All of the books agree that the surety is not to be bound beyond the fair scope of the terms of his contract. That is, “to the extent and in the manner and under the circumstances he consented to become liable.” *Friendly v. National Surety Co.*, 46 Wash. 71, 89 Pac. 177, 10 L. R. A. (N. S.) 1160, citing *Brandt, Suretyship and Guaranty* (2d ed.), §§ 118, 119.

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The case just cited notices a rule of construction that runs through all of the cases, that is, that the surety will be presumed to have considered the responsibility of the principal at the time the obligation was assumed; that contracts insuring or guaranteeing the payment of money by an individual or a firm are sustained by a confidence in the principal, and cannot be extended to others for whose account the surety may have refused to become holden. The rule is laid down in *Pingrey on Suretyship and Guaranty*, § 79, as follows:

"Where the liability of the surety is limited to the transactions and defaults of a principal, he cannot be made liable for defalcations and omissions of another principal who joins the first in the business."

See, also, *Stearns on Suretyship* (2d ed.), § 53; *Spencer, Suretyship*, § 198.

"It is a case of pure guaranty; a contract which is said to be '*strictissimi juris*'; and one in which the guarantor is entitled to a full disclosure of every point which would be likely to bear upon his disposition to enter into it. . . . He has a right to prescribe the exact terms upon which he will enter into the obligation, and to insist upon his discharge in case those terms are not observed. It is not a question whether he is harmed by a deviation to which he has not assented. He may plant himself upon the technical objection, this is not my contract, *non in haec foedera veni*." *Barnes v. Barrow*, 61 N. Y. 39, 19 Am. Rep. 247.

See, also, *Brandt, Suretyship and Guaranty* (3d ed.), § 133; *Stearns, Suretyship* (2d ed.), § 53; *Spencer, Suretyship*, § 198; *White Sewing-Machine Co. v. Hines*, 61 Mich. 423, 28 N. W. 157; *Dupee v. Blake*, 148 Ill. 453, 35 N. E. 867; *Mathews v. Garman*, 110 Mich. 559, 68 N. W. 243; *Parham Sewing Machine Co. v. Brock*, 113 Mass. 194; *Connecticut Mut. Life Ins.*

Co. v. Scott, 81 Ky. 540; *Standard Oil Co. v. Arnestad*, 6 N. D. 255, 69 N. W. 197, 66 Am. St. 604, 34 L. R. A. 861.

In the last case cited, the court said:

"A surety who engages to be responsible for the honesty of a firm may be entirely influenced by the consideration that one of the partners is a man of integrity, and of such strength of character and such shrewdness and watchfulness in business affairs, that the risk of dishonesty from the action of the other partner, in whom the surety may place no trust, is reduced to the minimum. The sureties in this case may have been willing to become bounden for the fidelity of Arnestad & Eggerud while acting as a firm, and yet at the same time not willing to incur the hazard of obligating themselves as sureties of the partner Arnestad alone. Based upon such considerations as these, the rule of law has long been established that the surety, standing upon the very letter of his contract, may insist that he cannot be held for aught that is done after the dissolution of the firm, for which alone he became responsible. . . . The case of *Dupee v. Blake*, 148 Ill. 453, 35 N. E. 867, so far as the principle of law is concerned, presents the same features as the case at bar. The court there said: 'The rule is that, if a surety engages for an individual, the engagement is understood to extend to the acts of that individual alone, and will not continue if he takes in a partner. In other words, the surety for a single individual is not liable for a partnership of which such individual is a member. A surety who guarantees that a firm composed of particular individuals will do certain acts or discharge certain duties, cannot be held liable where there is a change in the firm, although the firm name is not changed. As the surety's liability is *strictissimi juris*, and cannot be extended by construction, his guaranty to a partnership is extinguished if any partner is taken into or retires from the partnership, unless it appears from the terms of the instrument that the parties intended the guaranty to be a continuing one, without reference

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to the composition of the firm. A party may be induced to become surety for the individuals who compose a firm, because of his confidence in their integrity, prudence, accuracy, and ability as business men; but he cannot be presumed to have intended to become responsible for the possession of such qualities by some third person who may afterwards be taken into the firm without his knowledge or consent. It is often in the power of one partner, by want of discretion or integrity, to ruin another.' ”

The question of notice to the obligee is discussed in that case. It is said:

“Finally, it is said that it does not appear that the plaintiff knew of the withdrawal of Eggerud from the firm, and that hence it follows that the old firm, as a firm, was still liable to the plaintiff for the funds misappropriated, no matter by whom they were embezzled. Upon this foundation plaintiff builds up the argument that, inasmuch as the principals in the bond are liable, so are the sureties. But this reasoning entirely misapprehends the nature of the obligation of the sureties in this case. By signing the bond, they did not, in effect, assert to the plaintiff that they would be bound whenever the principals in the bond were liable in any way to the plaintiff, whether because of their having embezzled the property, or by reason of the doctrine of estoppel which would seal their lips against a denial of liability. They merely agree to become responsible for the fidelity of the firm so long as each of the members of the firm should remain in the business. They contracted to be bound for the acts of Arnestad so long as they could have the protection resulting from the association of Eggerud with him in the same business. But they did not guarantee the integrity of Arnestad alone, unwatched and influenced by Eggerud, who may have been the only person in whom they reposed any trust. If the plaintiff was ignorant of the change in the firm, so were the sureties; and, if the sureties have a right to stand upon the terms of their contract, then it behooved the plaintiff to ascertain at its peril whether

all the persons for whom the sureties had become responsible still remained at the helm of the business of the agency. On this point the decision of the court in *Birch v. De Rivera* (Sup.), [53 Hun 367], 6 N. Y. Supp. 206, is decisive. The court there said: 'The fact that the plaintiffs were not notified of the change is immaterial. They may have an action against the firm as it existed before the change, because of failure to notify them of such change, or to publish the notice of dissolution. That proceeds upon another principle—presumption attached to continuous firm dealings without notice. The guarantor, however, is not responsible for a state of facts which might justify a recovery against the original members. There is no evidence here that he was aware of the change. He seems to have been as much without notice as the plaintiffs. But, were it otherwise, we may say, in the language of Lord Blackburn, 'nothing is stated to show either that the defendant was under obligation to inform the banking house of the fact, or that he took steps to conceal it.' At all events, his contract is to guaranty a co-partnership composed of certain persons, and that contract cannot be altered or extended without his consent.' See, also, *Backhouse v. Hall*, 6 Best & Smith, 507.'

Appellant claims that there is an exception to the rule; that is, where the principal, after executing the bond, took in a partner and the goods were delivered on the credit of the principal and charged to his individual account, citing *Gilbert v. State Insurance Co.*, 3 Kan. App. 1, 44 Pac. 442, and *Brandt*, Suretyship and Guaranty, § 137, which is no more than the holding of the court in *Palmer v. Bagg*, 56 N. Y. 523.

But these cases, if they be sound, may be sustained upon an entirely different theory. They are cases where the obligee had appointed an agent for whose personal honesty the surety stands sponsor, thus raising a personal relation between the parties, and, so long as the relation of principal and agent continues

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to exist, the principal can look to the agent and will not be bound by the manner in which he does his business, whether by the employment of clerks, by doing business with another upon a commission basis, or by taking in a partner.

The case of *Palmer v. Bagg, supra*, is noticed in *Standard Oil Co. v. Arnestad, supra*. It is there said:

"But, in our judgment, these cases are plainly distinguishable from the case before us for final settlement. Their facts were different from the facts of this controversy in vital particulars. The sureties there had become responsible for the honesty of an individual agent. As the court very properly held, such sureties took the risk, not only of their principal's honesty, but also of the dishonesty of those whom he might employ in any capacity to assist him in the prosecution of the business of the agency. Should he hire a subagent as an assistant, the sureties would still be bound. And so they would remain liable if he should see fit to give such assistant an interest in the property of the business of the agency, provided the obligee did not deal with the new firm as agents, and thus extinguish the original agency. The sureties in those cases undertook to guarantee the fidelity of the agent to his trust, and therefore necessarily agreed to be responsible for whatever he should do himself or through his agents and employees. They agreed to assume the risk of his integrity and his business judgment in employing assistants in any capacity. It is upon this ground that all these decisions relied on by counsel for plaintiff proceed."

But if it be held that notice to the appellant must be shown, we think there is enough in the record to sustain the finding of the court that appellant ought to have known of the new relation. It knew that it had taken the bond of Ralph as an individual; it knew of the name and style under which he did business; it knew that Stringfield had been engaged in business on

his own account; it knew that a partnership actually existed between Stringfield and Ralph, but assumes to excuse itself by saying that it understood that their partnership was in the feeder cattle business and not in the commission business. There is no showing that, after the second day of June, appellant ever had any business at all with Stringfield as an individual. Cattle were shipped in by him and were sold at auction in the yards by Ralph, to its knowledge. These transactions, so far as the bookkeeping of the parties go, were carried out in the name of the Ralph Commission Company, so that, if the case depends upon notice and one of two innocent parties is to suffer, we think, clearly, that there was a duty upon appellant to inform itself of the extent of the partnership which it admits, and of which it took no concern upon an assumption which it is now certain had no foundation in fact.

The judgment of the lower court is affirmed.

MAIN, C. J., MACKINTOSH, and TOLMAN, JJ., concur.

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[No. 15033. Department One. January 10, 1919.]

EDNA QUIENT, *Respondent*, v. JOHN QUIENT,
Appellant.¹

DIVORCE (12)—CONDONATION—ACTS CONSTITUTING. The fact of living with her husband until she brought suit for divorce does not operate as a condonation of conduct amounting to cruelty which consisted of a series of acts and continued course of conduct.

SAME (80)—DIVISION OF PROPERTY. An allowance to the wife of \$1,000, and the household furniture valued at \$750, and a home valued at \$5,500, in trust for the benefit of a minor child, is not an unfair division, where the balance of the property, worth at least \$6,000, was awarded to the husband, even though it was largely separate property.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered April 13, 1918, upon findings in favor of the plaintiff, in an action for divorce, tried to the court. Affirmed.

Piles & Halverstadt, for appellant.

Thorwald Siegfried, for respondent.

MAIN, C. J.—The plaintiff brought this action for the purpose of obtaining a divorce from the defendant. The allegations of the amended complaint, which will be referred to as the complaint, were denied by an answer. The cause proceeded to trial and resulted in a judgment of absolute divorce, awarding the custody of the minor child to the plaintiff, and a division of the property. From this judgment, the defendant appeals.

The parties to the action were married on June 17, 1913. As a result of the marriage, one child was born, a daughter, who, at the time of the trial, was less than four years old. The respondent, in her complaint, claimed the right to a divorce on the ground of cru-

¹Reported in 177 Pac. 779.

elty, personal indignities rendering her life burdensome, and failure of the appellant to properly support and maintain herself and child. The trial court made findings sustaining the allegations of the complaint, and entered a judgment as above indicated.

It is first contended that the evidence does not sustain the findings of the trial court. It is probably true that the evidence fails to disclose any one act of shortcoming on the part of the husband which in itself would be sufficient to justify the divorce. But when the record is read in its entirety it discloses a course of conduct on the part of the husband, beginning early in the married life of the parties, which was humiliating and distressing to the wife, and which was prompted by his imperious and domineering disposition and utter lack of affectionate regard for his wife and her rights as a party to the union. It is unnecessary here to set out this distressing story, but it is sufficient to say that a careful consideration of the evidence leads us to the conclusion that the trial court properly entered a judgment dissolving the bonds between the parties.

It is next contended that, since the parties lived together until the very time when the action was instituted, the conduct of the husband has been condoned. Whatever the law of condonation may be, generally speaking, it is not applicable to the facts in this case. Where the conduct of the husband consists of a series of acts or a course of conduct such as this record discloses, the fact that the wife continues to live with him until the institution of the action, in the hope of better treatment, does not work a condonation of his conduct. 14 Cyc. 640; *Creyts v. Creyts*, 133 Mich. 4, 94 N. W. 383; *Phillips v. Phillips*, 1 Ill. App. 245; *Marks v. Marks*, 56 Minn. 264, 57 N. W. 651, 45 Am. St. 466.

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It may be remarked in passing that condonation was not pleaded as a defense in this case. But it is unnecessary here to consider to what extent the court will regard evidence of condonation (which is an affirmative defense and should be pleaded) when the same has not been pleaded. As already pointed out, the evidence does not show condonation.

Finally, it is claimed that the court made an improper division of the property. The respondent was given the sum of \$1,000 and the household furniture, which it was claimed was of the value of \$750. The home, which was of the approximate value of \$5,500, was given to the respondent in trust for the use, support and benefit of the minor child, with the proviso that, in case of her death prior to reaching majority, the same should be for the use and benefit of respondent. The balance of the property, which was at least of the approximate value of \$6,000, was to be retained by appellant. Even though the property may have been largely the separate property of the appellant, the trial judge did not abuse his discretion in making the division. It has been often held that, in actions of this kind, the property of the parties, whether separate or community, is before the court to make such disposition thereof as may be legally proper and just. Under this judgment the wife gets less than one-third as much property as the husband. The giving of the home to the child, as set out in the judgment, was not unreasonable.

The judgment will be affirmed.

FULLERTON, MITCHELL, TOLMAN, and CHADWICK, JJ.,
concur.

[No. 15038. Department Two. January 10, 1919.]

W. B. REEVES, *Respondent*, v. J. T. WILSON,
Appellant.¹

APPEAL (173)—TIME FOR TAKING—MOTION FOR NEW TRIAL. A motion for new trial suspends the effect of the judgment and time for taking an appeal cannot be curtailed by entry of a *nunc pro tunc* order denying the new trial.

PHYSICIANS AND SURGEONS (10-1, 11)—NEGLIGENCE—EVIDENCE—SUFFICIENCY. A recovery for negligence in doing dental work is sustained by evidence that the work was to be done to plaintiff's satisfaction, there was some evidence of negligent work, and he refused to correct it upon complaints made.

SAME (12)—NEGLIGENCE—INSTRUCTIONS. In an action for malpractice by a dentist, in which the patient later contracted blood poisoning not attributable to the teeth, an instruction is favorable to the defendant where it charges that, if the plaintiff was suffering from a diseased condition which the injury aggravated, he was entitled to recover all damages actually flowing from the injury, except such as must have followed in case the defendant's negligence had not intervened.

SAME (13)—NEGLIGENCE—MEASURE OF DAMAGES. In an action for malpractice by a dentist, the measure of damages is actual compensation for loss and suffering caused by the negligent performance of the work, and not recovery of the expense of replacing it.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered October 18, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Zent & Powell, for appellant.

C. E. H. Maloy, for respondent.

HOLCOMB, J.—In the early part of 1916, respondent noticed in a paper appellant's advertisement guaranteeing dental work. Respondent went to appellant's office and appellant, he claims, orally agreed that he

¹Reported in 177 Pac. 825.

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would guarantee his work as being performed in a skillful, competent, and careful manner and to the satisfaction of respondent; that, in event any of the work should prove unsatisfactory or to have been done in an unskillful, incompetent, or careless manner, appellant would replace any work done, or repair and do over such work as might have been improperly performed. Appellant did certain work for respondent, including the placing of a three-tooth bridge upon his upper left bicuspid, with a dummy tooth anchored from one side. The other allegations of the complaint the court withdrew from the jury, thus leaving nothing involved in this action except matters relating to this particular bridge. Respondent claims that, from May, 1916, after the work was performed, the bridge caused soreness, and he made immediate complaints to appellant, who informed him that it was a tenderness which he would have to get used to. The following summer, while respondent was in Seattle, he contracted blood poisoning in his hand, not attributable to the teeth, and returned to Spokane to be treated, but not having serious trouble with his teeth, did not call on the appellant or ask him to repair or replace any work under the terms of the agreement. After this blood poisoning occurred, respondent lost weight and had more serious trouble with his teeth. He returned to Spokane in the spring of 1917, called on the appellant twice, and claims that he demanded that the appellant replace or repair the bridge, but was refused. Appellant testified that respondent was violent, disorderly, and profane, and that he refused to talk with him until he would conduct himself in a proper manner. Respondent had paid appellant \$30 for the dental work of placing a three-cap bridge in respondent's lower right jaw and a three-cap bridge

in his upper left jaw. After the last altercation with appellant, respondent went to Dr. Reed to have the bridge removed and his teeth treated.

Respondent brought this action against appellant, which resulted in a verdict for \$200 in his favor.

At the threshold we are confronted with a motion to dismiss the appeal for the reason that it was not taken within ninety days from the entry of judgment. It appears that the judgment was signed and filed on October 18, 1917. The order denying the motions for judgment notwithstanding the verdict and for a new trial was signed and filed with the clerk October 30, 1917. The superior court journal for Tuesday, October 30, 1917, has the following:

"No. 54179. W. B. Reeves, plaintiff, vs. J. T. Wilson, defendant. Order signed denying motion for new trial and for judgment notwithstanding the verdict and same signed as of the 16th of October.

"Signed _____, Judge."

The motion for a new trial suspends the effect of the judgment until after the determination of the motion and filing of the order denying the motion. An appellant cannot be deprived of his right of appeal by the entry of a *nunc pro tunc* order. If this were not so, he could be deprived of his right of appeal by the court taking under advisement the determination of a motion for new trial for a period of ninety days or longer, and then entering a *nunc pro tunc* order. The motion to dismiss the appeal is denied.

Appellant assigns that the court erred, (1-2) in denying appellant's motions for judgment notwithstanding the verdict and for a new trial; (3 and 5) in giving instructions Nos. 21 and 22; (4) in refusing to give defendant's requested instruction No. 6; (6) in denying appellant's motion to strike from the amended and supplemental complaint.

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This case belongs to a different class from the cases of *Lorenz v. Booth*, 84 Wash. 550, 147 Pac. 31, and *Dahl v. Wagner*, 87 Wash. 492, 151 Pac. 1079, and is more nearly parallel to the case of *Swanson v. Hood*, 99 Wash. 506, 170 Pac. 135, where this court distinguished the two classes of cases as follows:

"But there is an obvious distinction between a claim of negligence in the choice of methods of treatment and a charge of negligence in the actual performance of the work or treatment after such choice is made. As to the first, the charge is refuted, as a matter of law, by showing that a respectable minority of expert physicians approved of the method selected, thus taking the case from the jury. As to the second—a charge of negligent performance—where there is any evidence tending to show such negligence the case is for the jury, as in other cases of negligence, whenever upon the evidence the minds of reasonable men might differ. We think the case here falls within the latter category. There was evidence that appellant admitted to respondent, respondent's wife, his mother-in-law and his clerk that he drilled the holes in the bone too large for the screws used in placing the plate, and, for that reason, wrapped the plate and the bone with a wire, and that the wire caused the trouble. There was also evidence that, in removing the wire, appellant used great force, and in removing the plate splinters of bone were pulled away. True, this use of excessive force was controverted by appellant and some of his witnesses, but the conflict made a question for the jury."

There is some evidence in this case tending to show that appellant was negligent in the manner of executing the work he contracted to perform: (1) In constructing the bridge so that the false tooth occluded with the molars below; (2) in constructing the bridge so as to permit a shoulder at the gum margin on one of the bicuspid; (3) in placing a bridge with great

leverage on respondent's teeth; and (4) in constructing the bridge upon the upper left bicuspid of respondent with a view of thereafter placing a bridge upon the lower left bicuspid, when there was no contract between appellant and respondent for building the lower bridge. Appellant's conduct in doing the work under such circumstances would be unwarranted and wrongful. The case was submitted to the jury on the theory that appellant had breached the contract in not having performed it to the entire satisfaction of respondent, and had performed the contract in a careless and negligent manner. Respondent complained from the time the bridge was placed on his bicuspid until it was removed. Appellant agreed to do the work to the entire satisfaction of respondent, but when respondent complained, appellant evaded him by telling him that it was a tenderness which he would have to get used to, and later refused to correct or replace it. Appellant, learning that respondent had contracted blood poisoning several months after the injury, attributed the damage to respondent's teeth to the blood poisoning instead of defective work.

Appellant contends that he sustained prejudice by the giving of instruction No. 21. A careful examination of this instruction—That, if the jury found from the evidence "that plaintiff at the time was suffering from a diseased condition and such injury aggravated and accelerated such condition, then the plaintiff is entitled to recover all damages which actually flowed from the injury, except such as must have followed if such unskillfulness, incompetency, carelessness, or negligence of the defendant had not intervened," shows it to be favorable to appellant.

It is clear from this instruction that respondent could not recover for anything except the damage suffered because of appellant's carelessness and negli-

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gence. It expressly excluded from the consideration of the jury any damage which the respondent may have suffered because of blood poisoning.

Appellant seeks to place a construction upon the testimony in the case such that respondent can only recover \$75, or what it would have cost to do the work over, and complains of an instruction submitting the measure of damages. The instructions given by the court fairly measured the damages to be actual compensation for loss and pain and suffering from negligent performance of the work contracted to be done, instead of the mere recovery of the expense of replacing, and we find no error in such measure of damages allowed.

The instructions were as favorable to appellant as he was entitled to under the evidence. The judgment is affirmed.

MAIN, C. J., MOUNT, FULLEBTON, and PARKER, JJ.,
concur.

[No. 15058. Department Two. January 10, 1919.]

THE STATE OF WASHINGTON, *on the Relation of*
C. D. Hillman et al., Plaintiff, v. THE
SUPERIOR COURT FOR KING COUNTY,
Calvin S. Hall, Judge, et al.,
*Defendants.*¹

CERTIORARI (5)—WHEN LIES—APPEAL. Certiorari does not lie to review an order dissolving a temporary injunction, in the absence of a finding of insolvency, since in such case the order is not appealable.

Application filed in the supreme court October 5, 1918, for a writ of certiorari to review an order of the superior court for King county, Hall, J., dissolving a temporary injunction. Denied.

Wilson R. Gay and *Geo. H. Rummens*, for relators.
Byers & Byers and *Aust & Terhune*, for defendants.

MOUNT, J.—This is an application for a writ to review an order of the lower court dissolving a temporary restraining order. When the application was made to this court, on affidavit of the relator, a show cause order was entered, and further proceedings ordered stayed in the lower court until the final hearing on the application for the writ. Thereafter a return was made to the writ. The respondent also filed a motion to dismiss the application for the reason that this court is without jurisdiction to issue a writ to review an order of the lower court dissolving a temporary restraining order where no finding of insolvency is made. This motion must be sustained. We had occasion recently to examine this question in

¹Reported in 177 Pac. 773.

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the case of *State ex rel. Lilly Co. v. Brawley*, 104 Wash. 374, 176 Pac. 337. After quoting the statute in regard to appealable orders, we there said:

"This court has uniformly held that an extraordinary writ will not issue to review or supersede an order denying a temporary injunction, which by statute is not appealable, unless there is a finding of insolvency, because the legislative intent is that such orders shall be reviewed only on appeal from the final judgment. *State ex rel. Young v. Superior Court*, 43 Wash. 34, 85 Pac. 989; *State ex rel. Mohr v. Superior Court*, 54 Wash. 225, 103 Pac. 17; *State ex rel. Coombs v. Superior Court*, 69 Wash. 439, 125 Pac. 779."

It is not claimed that the parties against whom the restraining order was sought were insolvent, and the court made no finding upon that question. It is plain, therefore, that this court is without jurisdiction to review, by extraordinary writ, the order of the superior court dissolving the temporary restraining order. The application for the writ must therefore be dismissed.

MAIN, C. J., FULLERTON, PARKER, and HOLCOMB, JJ.,
concur.

[No. 15084. Department Two. January 10, 1919.]

THE STATE OF WASHINGTON, *on the Relation*
of C. D. Hillman et al., Plaintiff, v.
*E. M. GORDON et al., Defendants.*¹

CONTEMPT (7)—ACTS CONSTITUTING—VOID ORDER. Disobedience of an order entered without jurisdiction of the subject-matter is not contempt.

Motion filed in the supreme court October 19, 1918, to quash a citation to show cause why defendants should not be punished for contempt for violation of an order of the supreme court. Granted.

Wilson R. Gay, Geo. H. Rummens, and Carroll B. Graves, for relators.

Byers & Byers and Aust & Terhune, for defendants.

MOUNT, J.—In this case the defendants were cited to show cause why they should not be punished for contempt for an alleged violation of an order of this court restraining them from proceeding further in a case pending in the lower court. In addition to answering upon the merits, the defendants have moved to quash the citation because this court was without jurisdiction to enter the order. In the case of *State ex rel. Hillman v. Superior Court*, ante p. 324, 177 Pac. 773, we have held that this court was without jurisdiction to enter the order which, it is alleged, has been violated. Conceding, without deciding, that the defendants have, in substance, violated the order, this court has held that disobedience of an order issued by a court without jurisdiction of the subject-matter is not contempt. *State ex rel. Evans v. Winder*, 14 Wash. 114, 44 Pac. 125, and cases there cited. See,

¹Reported in 177 Pac. 773.

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also, *Simon Piano Co. v. Fairfield*, 103 Wash. 206, 174 Pac. 457; 9 Cyc. 10.

The citation is therefore dismissed.

MAIN, C. J., FULLERTON, PARKER, and HOLCOMB, JJ.,
concur.

[No. 15115. Department Two. January 10, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
THOMAS J. BRANIFF, *Appellant*.¹

LARCENY (25, 28)—EVIDENCE—SUFFICIENCY. The positive testimony of two accomplices that accused assisted and participated in the stealing of horses, sustains a conviction of larceny; the credibility of the witnesses being for the jury.

WITNESSES (127)—CORROBORATION—PREVIOUS CONSISTENT STATEMENTS. In a prosecution for larceny, in which practically the only testimony against the accused was that of two accomplices, which was not "assailed" by the defense by any impeaching evidence otherwise than by the opening statement that it was a "frame up," and by cross-examination, it is error to allow the state, in its case in chief, to corroborate the witnesses by testimony of the sheriff that, in his confession, one of the accomplices had made previous consistent statements.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered November 14, 1917, upon a trial and conviction of grand larceny. Reversed.

C. H. Baldwin, for appellant.

Homer L. Post, for respondent.

PARKER, J.—The defendant Braniff was convicted, by verdict and judgment rendered in the superior court for Asotin county, of the crime of grand larceny, committed by the stealing of three horses. He has appealed to this court.

¹Reported in 177 Pac. 801.

It is contended in appellant's behalf that the evidence introduced upon the trial was not sufficient to sustain the verdict and judgment, and that the trial court should have so decided as a matter of law. There was evidence, if believed by the jury, to support the conviction. It became a question of the credibility of witnesses, particularly of two witnesses, who were confessed accomplices with appellant in the alleged commission of the crime. Their testimony was positive to the effect that appellant had assisted and participated with them in the stealing of the horses, so it was for the jury to decide whether or not they were telling the truth touching the question of appellant's guilt with them. We conclude, therefore, that appellant is not entitled to a reversal of the judgment and to his discharge upon this ground, though he may be entitled to a new trial because of error in the admission of evidence, as to which we now proceed to inquire.

It is contended by counsel for appellant that the trial court erred to his prejudice in permitting, over his objection, the sheriff of Asotin county to testify to statements made by Roy Clark upon a former occasion, consistent with the testimony given by him upon the trial. The purpose of the prosecuting attorney in introducing the sheriff's testimony as to Clark's previous statements was to sustain and corroborate Clark's testimony given upon the trial. The facts determinative of this question may be summarized as follows: Roy Clark and his brother, Orval, also called "Sank," were the two confessed accomplices in the alleged commission of the crime by appellant, though appellant was charged and tried therefor separately. In making his opening statement to the jury outlining the defense, counsel for appellant stated,

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among other things, that "we will show you that there never was any friendship existing between the defendant and any of these Clarks. We expect to show you that it is a frame-up from start to finish on the part of these Clarks." The testimony of the Clarks is largely relied upon by the prosecution to show the commission of the crime by appellant; indeed, that is practically the only evidence in the record tending to connect appellant with the stealing of the horses. After Roy Clark had testified for the prosecution, relating in considerable detail how he and his brother and appellant, in pursuance of their previous agreement, had stolen the horses and taken them to Oregon, the sheriff was called as a witness for the prosecution and permitted, over the objection of counsel for appellant, to testify as follows:

"Q. Where did you first see Roy Clark? A. In Walla Walla. Q. When was that? A. In January; I don't remember the date. Q. January of this year? A. Yes, 1917. Q. Were you present there in Walla Walla when he made his confession? A. Yes, sir. Q. Did you hear him confess? A. I did. Q. You have heard the testimony he has given on the trial in this case? A. Yes, sir. . . . Q. Was the confession substantially the same as he testified to on the witness stand? A. His confession there was the same in substance as it has been given here on the witness stand."

This plainly had reference to statements made in Clark's confession implicating appellant in the stealing of the horses. During the cross-examination of Clark by counsel for appellant he was asked and answered as follows:

"Q. Is it not a fact, Roy, that you and Sank (the brother) and Bosley ran off the horses, and afterwards made up the scheme to throw the blame on to Tom Braniff? A. No, it is not."

It was thereafter that the testimony of the sheriff was given as part of the prosecution's case, and before any evidence whatever had been offered or introduced in appellant's behalf. No evidence was introduced on appellant's behalf at any time tending to show that Roy Clark had in his confession at Walla Walla, or at any other time, made statements inconsistent with what he testified to upon the witness stand as to appellant's connection with the stealing of the horses. In other words, there was no attempt on the part of appellant's counsel to impeach Roy Clark as a witness by showing previous statements made by him inconsistent with his story told upon the witness stand. Nor was there any impeaching evidence of any nature introduced, as such, in appellant's behalf as against Roy Clark as a witness. We think there are no other facts disclosed by the record which would be of aid to the prosecution in showing the admissibility of the sheriff's testimony.

Counsel for appellant invoke the general rule as stated in the text of 10 R. C. L., page 960, as follows:

"Statements made by a witness to other persons are no exceptions to the hearsay rule. . . . Nor can evidence of what a witness has said out of court be received to fortify his testimony. It violates a first principle in the law of evidence to allow a party to be affected, either in his person or his property, by the declarations of a witness made without oath. And, besides, it can be no confirmation of what the witness has said on oath, to show that he has made similar declarations when under no such solemn obligation to speak the truth."

That this is well settled law, subject to some few exceptions, is shown by numerous authorities, among which we note the following: *Pulsifer v. Crowell*, 63 Me. 22; *Connor v. People*, 18 Colo. 373, 33 Pac. 159, 36 Am. St. 295, 25 L. R. A. 341; *Stolp v. Blair*, 68 Ill.

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541; *State v. Taylor*, 134 Mo. 109, 154, 35 S. W. 92; *James v. State*, 115 Ala. 83, 22 South. 565; *Conway v. State*, 33 Tex. Cr. 327, 26 S. W. 401; *Loomis v. New York, New Haven & H. R. Co.*, 159 Mass. 39, 34 N. E. 82; *Builders' Supply Co. v. Cox*, 68 Conn. 380, 36 Atl. 797.

This is conceded to be the well established rule, but counsel for the state argues that the sheriff's testimony in this case was admissible under the exception thereto, which he states as follows:

"—when the testimony of a witness is assailed as a recent fabrication, evidence of prior consistent statements is admissible."

It seems that some courts have stated an exception to the rule in this somewhat general language, but in the application of such exception the great majority of the decisions show that the word "assailed," when so used, means assailed by at least some form of impeachment of the witness testifying upon the trial. Now the only manner in which Clark's testimony was assailed by counsel for appellant was, as claimed by counsel for the state, the statement of appellant's counsel in making his opening statement, preliminary to the introduction of any evidence, even on behalf of the state, and his cross-examination of Clark before the sheriff testified. It was not claimed that, up to this time, or even thereafter during the trial, there was any attempt to prove in appellant's behalf that Clark had at any time previously made statements inconsistent with, or contradictory of, his testimony given upon the trial, or that there was any attempt on the part of counsel for appellant to introduce impeaching evidence of any nature, as such, against Clark as a witness. No decision has come to our notice, and we think there is none, holding that the mere

assertion of counsel, such as was made by counsel for appellant in his opening statement to the jury, that "we expect to show you that it is a frame-up" etc., constituted such an assailing of Clark's testimony as to render this testimony of the sheriff as to Clark's previous consistent statements admissible. We also think that the great weight of authority is to the effect that the mere assailing of a witness' testimony by cross-examination, though such cross-examination may suggest impeachment, does not render it permissible to prove previous consistent statements of the witness in order to sustain or corroborate his testimony given upon the trial. In 1 Greenleaf, Evidence (16th ed.), § 469b, that learned author says:

"In the eighteenth century it was considered proper to receive such statements in corroboration, even before the witness had been discredited in any way. But this doctrine has wholly passed away; for it is clear that an untrustworthy story is not made more trustworthy by any number of repetitions of it. There must at least have been some sort of discrediting of the witness, which the consistent statements help to remove. . . ."

And after noting some exceptions to the general rule, with which we are not here concerned, he further says, at the conclusion of that section, as follows:

"It is sometimes said that this sort of evidence is admissible after impeachment of any sort, in particular, after any impeachment by cross-examination; but there is no reason for such a loose rule."

In 5 Jones, Commentaries on Evidence, § 870, that learned author says:

"There are a few exceptional cases contrary to the great weight of authority which admit evidence of prior consistent statements to corroborate the witness, when he is attacked on cross-examination in almost any manner."

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Counsel for the state cites and relies upon the following of our own decisions as recognizing and making applicable to this case the exception to the general rule which he here invokes: *State v. Manville*, 8 Wash. 523, 36 Pac. 470; *State v. Coates*, 22 Wash. 601, 61 Pac. 726; *Conover v. Neher-Ross Co.*, 38 Wash. 172, 80 Pac. 281, 107 Am. St. 841; *State v. Spisak*, 94 Wash. 566, 162 Pac. 998. We think a critical reading of those decisions will plainly show that each has to do with testimony introduced to rebut impeaching testimony which had been given tending to show that the witness had previously made statements inconsistent with his testimony given upon the trial. In other words, in each of these cases the testimony of the witness had been assailed by impeaching testimony tending to show previous inconsistent statements; and it was to rebut the making of such alleged inconsistent statements by the witness that the testimony in question was held to be admissible. In none of them was the witness' testimony assailed by the mere assertion of counsel in his opening statement to the jury, or by mere cross-examination of the witness. It would also seem that in no event could it be said that the testimony of Clark was assailed by counsel for appellant as a recent fabrication, so as to render the sheriff's testimony admissible. Clark's testimony was given upon the trial of this case in November, 1917, while the claimed consistent statement made by him in the making of his confession, as testified to by the sheriff, occurred in January, 1917, and we note that whatever suggestion the record may disclose as to ill-feeling existing between Clark and appellant is to the effect that such ill-feeling came into existence long before he made the statements in his confession implicating appellant, to which the sheriff testified. So there is

nothing here to indicate that Clark, when making his confession implicating appellant, was inspired by any different feeling toward appellant than at the time he testified at the trial. Of course, in his confession, he was making a statement against his own interest, but whatever interest he had in the implication of appellant existed at the time he made his confession, in exactly the same degree as it did at the time he testified upon the stand, in so far as any suggestion of his ill-feeling towards appellant can be drawn from the record in this case. This is not a case of Clark making a previous consistent statement against his own interest; nor is it a case of Clark making a previous consistent statement at a time when he had any motive or interest different from that at the time he testified in this case, in so far as we are concerned with appellant's rights here involved. We are of the opinion that the sheriff's testimony was erroneously admitted, and that it was highly prejudicial to appellant's rights; especially in view of the fact that the question of his guilt was to be determined by the jury practically wholly upon the testimony of the accomplice witnesses, Clark and his brother.

Some contention is made that the question of the admissibility of the sheriff's testimony is not properly before us for want of proper objections, exceptions and assignments of error. The objections and exceptions, and also the formal assignments of error, are a little involved as they appear in the record; but we think it is clear that they appear therein in such manner as to entitle appellant to have the question of the admissibility of the sheriff's testimony reviewed here. The testimony of the sheriff relating to the testimony of Orval Clark and his previously claimed consistent statements made in his confession

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implicating appellant was, in substance, the same as the sheriff's testimony relating to the testimony of Roy Clark and his previous consistent statements. To review the claim of error as to this testimony would be but to repeat what we have already said.

The judgment is reversed, and appellant awarded a new trial.

MAIN, C. J., FULLERTON, MOUNT, and HOLCOMB, JJ.,
concur.

[No. 14875. Department One. January 17, 1919.]

RUTH MASON, *Appellant*, v. JOHN A. YEARWOOD *et al.*,
Respondents.¹

WATERS AND WATER COURSES (61, 62)—PRESCRIPTIVE RIGHTS—EXTENT—LACHES—ESTOPPEL. Where an owner, entitled by prescription to seepage waters for irrigation, for years delayed to establish her rights, refused to accept the waters through a closed drain and stood by for years while adjoining lands were drained and reclaimed at great expense, she is estopped by laches from interfering with the reclamation; and her prescriptive right should be subject to such diversion as may be necessary to protect the lands drained, which can in no event be used as a reservoir for the storage of the waters.

Appeal from a judgment of the superior court for Kittitas county, Holden, J., entered January 22, 1918, in favor of the defendants, dismissing an action to enjoin the diversion of waters used for irrigation purposes, tried to the court. Reversed.

O. O. Felkner, for appellant.

Hovey & Hale, for respondents.

TOLMAN, J.—A previous action between these same parties was before this court and decided in *Mason v. Yearwood*, 58 Wash. 276, 108 Pac. 608, 30 L. R. A. (N. S.) 1158. In that case the appellant there, and

¹Reported in 177 Pac. 777.

here, made three principal contentions: First, that she was entitled to the water from certain springs situated on the land of respondents, by virtue of prior appropriation; second, that she was a riparian owner on the stream flowing from the springs, and therefore entitled to the flow; and third, that she was entitled to the water flowing from the springs by prescription. Her claims upon the first and second grounds were denied in that case, but it was held that she might establish a claim by prescription to a quantity of water flowing therefrom equal to the wonted flow ten years prior to the beginning of that action. There being no evidence in the record from which the amount of that flow could then be determined, the judgment was affirmed, but without prejudice to the right of appellant to bring a new action to establish her claim by prescription, and the amount of water to which she was entitled. That case was decided in May, 1910, but appellant took no steps to establish her rights there recognized until the commencement of this action by the filing of her complaint on June 11, 1917, except that she brought a similar action in November, 1916, which she voluntarily dismissed. The complaint in this case restates in considerable detail the facts upon which the appellant relied in the previous case (to which reference is now made for a better understanding of the issues), and in addition, pleads that she is entitled by prescription to the uninterrupted flow of twenty-five inches of water, miner's measure, under a four-inch pressure, and that respondents have, since the decision in the previous case, constructed ditches, pipes and underground drainage in such places and in such manner as to divert all of the flow of water from appellant's land.

Respondents, by answer, pleaded that, after the final decision of the prior case, they tendered to appellant

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a quantity of water in excess of what she was entitled to by prescription, which she refused to accept, contending that she was entitled to the entire drainage from respondents' lands, and that, because of her failure to bring an action to determine the amount of water to which she was entitled, they assumed that she did not wish to further litigate the question, and proceeded to install, at great expense, a drainage system, whereby they reclaimed and made productive their lands which were previously covered by water, and prevented an increase in area of their flooded lands, and that, because thereof, appellant is now estopped by her laches. In the judgment entered below, the trial court found that appellant has title by adverse possession of ten inches of water, miner's measure, under a four-inch pressure, flowing from respondent Yearwood's lands, during such period each year as the same is needed for irrigation; that respondent Yearwood had offered to appellant all the water to which she was entitled, if she would permit him to conduct the same across his land in a closed drain so as to avert the growing damage by flooding to his premises, which offer was refused; whereupon Yearwood gave notice that he would divert the water by other means, in order to save and reclaim his lands, and that he proceeded to do so, thereby saving his lands from greater inundation and reclaiming and placing them in a high state of cultivation; that the drainage system thus installed does not actually connect with the springs or with the flow therefrom, but by seepage and percolation does divert the water in a substantial degree, and the water so diverted has been put to a beneficial use by respondents; that respondent Yearwood was within the rule of reasonable use of his own land in so doing, and could not be enjoined, and

that appellant had been guilty of laches; whereupon the action was dismissed with costs to respondents, and this appeal followed.

After a careful examination of the record, we are convinced that the intention of the trial judge was in the main right. The evidence does not preponderate against his finding that, in the year 1898, when the adverse possession began, appellant or her predecessors in interest were receiving from this source not to exceed ten inches of water, as found by him; but we think that the right was used to some extent at all seasons of the year, and whatever the flow might be, not exceeding the ten inches, at times other than in the irrigation season, appellant would be entitled to receive that flow, except as she may have lost her rights by her laches.

We also are convinced that the evidence sustains the finding that respondent Yearwood offered to deliver to appellant all the water to which she was entitled, through a closed drain, and that the reasonable use of his own property, and the protection and reclamation thereof, could not be thwarted by appellant's refusal to accept the water, or by her delay in bringing the action which this court in 1910 had said she might bring. Therefore, appellant's right to receive the ten inches of water during the irrigation season, and the flow, not exceeding ten inches, during the non-irrigation season, should be subject to such diversion of the water as may be necessary to keep respondents' lands drained and reclaimed, as they are at present, by the present drainage system which, by appellant's non-action, she has permitted to be installed; the reason being that, while appellant has not lost her prescriptive right to the use of the water by delay for a period less than that prescribed by the statute of limitations,

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and those now beneficially using the water have gained no prescriptive right thereto, yet by her acts in refusing the water as offered, and her delay in bringing this action and standing by while respondent Yearwood reclaimed his land at great expense, she is now estopped from asserting any right which might interfere or be inconsistent with the full enjoyment by respondent Yearwood of the fruits of the reclamation which he has brought about.

In order that this controversy may be ended, the court should also have provided by judgment that appellant be permitted to go upon the lands of respondents so far as necessary to keep free from obstructions the passageway by ditch or natural channel through which the water flows, so that it may be and remain, at all times, in the condition in which it was in 1898, when the right attached, so far as may be necessary to secure the flow of water awarded to her, if that may be secured without interference with the present state of reclamation of respondent's land, with the privilege, however, to respondent Yearwood, if he desires, at his own expense, to deliver the water at his lower boundary line where it left his land in 1898, in a box or underground drain, in which event he should keep such drain in repair at his own expense, and appellant, so long as such drain adequately serves its purpose, to have no right to interfere therewith or enter respondent Yearwood's premises. On no account should appellant be permitted to use respondents' land as a reservoir for the storage of water, to the impairment or detriment of the improvements and reclamation which had taken place prior to the beginning of this action.

These conditions, carried into a judgment, will perhaps please neither party to this action. But from the

state of the record before us, and in view of the facts found by the trial court, they approximate equity as near as may be. They recognize and establish appellant's right to the use of the water according to her title by prescription, because, having acquired such title, it may be taken from her only as might similar property where title was acquired by deed. Appellant's unreasonable delay of more than seven years in bringing this action, her refusal to accept the water as offered to her by respondent Yearwood (which appears to have been a fair and reasonable offer of delivery), and her neglect to act when notified by Yearwood that, in order to prevent a growing injury to his land and to reclaim and put in cultivation that already inundated, he must, and would, otherwise dispose of the water if appellant would not accept it in the manner offered, and her neglect to act at all for several years thereafter, although for at least three years prior to the beginning of this action she had received none of the water, all constituted laches upon appellant's part which estop her from complaining of, or asserting rights which will interfere with the reclamation which has taken place.

In view of the equities in the case, each party will bear his own costs, both in this court and in the court below.

Reversed, with instructions to enter judgment in harmony with these views.

MITCHELL, MACKINTOSH, and MAIN, JJ., concur.

CHADWICK, C. J. (concurring)—I concur in the opinion of Judge Tolman, upon the understanding that appellant cannot claim the flow of ten inches of water as a present right, but that her right is limited to the use of such water only as may naturally flow from the source over and above that which is carried into the

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drainage system and to which other rights have attached. It may not be more than ten inches; it may be less.

[No. 14905. Department Two. January 17, 1919.]

WILLAPA CONSTRUCTION COMPANY, *Appellant*, v.
M. J. SHAHOUR *et al.*, *Respondents*.¹

PRINCIPAL AND SURETY (13-1)—LIABILITY OF SURETY—SUPPLIES. A bond conditioned for the performance of a logging contract and the repayment of all sums advanced by the obligee to the principal for labor and lien claims, does not permit recovery for "supplies" furnished by the obligee to the principal, since that was beyond the contemplation of the bond.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered January 9, 1918, upon findings in favor of the defendants, in an action on contract, tried to the court. Affirmed.

Welsh & Welsh, for appellant.

Paul Holbrook, for respondents.

MOUNT, J.—This action was brought to recover \$500, against the defendant as surety upon a contractor's bond for the faithful performance of a contract. Upon issues joined, the case was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff for \$52.20, and costs. The plaintiff has appealed.

Appellant alleges that the court erred: First, in not entering judgment for \$500, the full penalty on the bond; and second, in not permitting appellant to prove that it furnished supplies on orders drawn by the principal contractor. The first of these assignments of error depends upon the second, so that it will be

¹Reported in 177 Pac. 785.

necessary to determine only whether the bond was liable for such supplies. It appears that, on June 1, 1915, the appellant, Willapa Construction Company, as party of the first part, entered into a contract with A. V. Larson, as party of the second part.

The first paragraph of that contract provides that the second party will immediately commence cutting into sawlogs of merchantable size and length all of the merchantable trees upon a certain tract of land, the work to be commenced immediately and continued diligently until completed, and to be completed within nine months from the date of the contract.

The second paragraph provides that the second party shall cut the logs into such lengths as the first party may demand, and that he will raft said logs and cause them to be towed to mill booms in the city of Raymond, for which he shall receive \$4 per thousand feet, board measure.

The third paragraph provides that the second party shall cut the timber as close to the ground as practicable and remove all merchantable timber, and cause said logs to be delivered to the mill booms free and clear from all liens, claims and incumbrances.

The fourth paragraph provides that the logs shall be scaled and that the cost shall be borne equally between the parties.

Paragraphs 5 and 6 are as follows:

“(5) The first party agrees that if the second party shall comply with the terms and conditions of this contract, that it will, as said work progresses, pay or honor orders to an amount not to exceed five hundred dollars (\$500), which orders shall be given in payment of labor performed for the second party in logging said timber, and shall be drawn by the second party upon the first party.

“(6) It is further agreed between the parties hereto that the second party shall cause to be executed

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and delivered to the first party a good and sufficient bond in the penal sum of five hundred dollars (\$500) to guarantee the faithful performance of this contract."

Paragraph 7 provides that, when logs are delivered, if there are any liens or claims against the logs which are lienable, the first party may pay such liens or claims, or retain sufficient money to do so from the sums due, or to become due, the second party, and if such claims or liens, or any advances made, should exceed the amount due the second party, then the first party may at its option terminate the contract and use all the machinery, supplies and equipment of the second party then on the ground in completing the contract.

Paragraph 8 provides that all sums advanced by the first party, regardless of whether or not the sum may exceed the sum of \$500, may be retained by the first party from any moneys due, or to become due, the second party.

Paragraph 9 provides that all logs cut from the above land shall be branded with a brand furnished by the first party.

The bond executed by Mr. Larson and the respondent is as follows:

"Know all men by these presents: That we, A. V. Larson, as principal, and M. J. Shahour, as surety, are held and firmly bound unto the Willapa Construction Company, a corporation of the state of Washington, in the penal sum of five hundred dollars (\$500), for which payment well and truly to be made we bind ourselves and our and each of our heirs jointly and severally by these presents.

"The condition of the obligation is such that

"Whereas, the above named principal has entered into a contract with the Willapa Construction Company, a copy of which said contract is hereto attached and made a part hereof,

"Now, therefore, if the said principal herein shall faithfully perform all of the terms and conditions of said contract and pay to the said Willapa Construction Company all sums, if any, advanced by it, and cut and remove said timber within the time and manner provided in said contract, and perform all and singular the terms and conditions of said contract to be performed on his part, then this obligation shall be null and void, otherwise to be and remain in full force and effect.

"Witness our hands and seals this 1st day of June, 1915.

"A. V. Larson, Principal,

"M. J. Shahour."

Under this contract it is clear that Mr. Larson was authorized to draw upon the appellant for an amount not to exceed \$500 in payment of labor performed for the second party in logging said timber; and in the seventh paragraph it is provided that if, when logs are delivered by the second party, there are "any liens or claims against said logs which are lienable, the first party may at its option pay and discharge said liens or claims" from any money which may be due the second party. It seems too plain for argument that the money which was to be advanced by the appellant to Larson under this contract was for claims which might become a lien against the logs cut. It is not claimed by the appellant that recovery was not permitted for items of this character, but it is argued that the court erred in not permitting the recovery for *supplies* furnished to Larson by the appellant. We find nothing in the contract which the bond was given to secure providing for any advancement for supplies. The only advancements contemplated were for the payment of labor performed in logging said timber, or, as provided in the seventh paragraph, for money paid to release claims which might be lienable against

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the logs. There is nothing in the contract which contemplates that the appellant might furnish supplies or loan money to Mr. Larson, and the bond, of course, was not given for any such purpose unless that purpose was designated in the contract. As a matter of fact, the evidence shows that, after this contract was entered into, the appellant agreed to furnish supplies, and did so; but that, of course, was an entirely independent contract, and it was not secured by the bond sued upon. The defendant in this case was not the contractor. He was surety only to the contractor, and therefore had a right to rely upon the contract for which he became surety. It seems clear from a consideration of the contract and the bond that the surety was liable only for the amounts paid for labor upon the logs, or for claims which were lienable against the logs. The trial court was therefore right in concluding that lienable items only could be recovered under the bond.

The judgment must therefore be affirmed.

MAIN, HOLCOMB, PARKER, and FULLEBTON, JJ., concur.

[No. 14919. Department One. January 17, 1919.]

H. F. ALEXANDER, *Respondent*, v. AL G. BARNES
AMUSEMENT COMPANY *et al.*, *Appellants*.¹

DAMAGES (62)—MEASURE OF DAMAGES—PERSONAL PROPERTY. The measure of damages for injury to an automobile is the difference between its market value just before the injury and immediately thereafter, and not the cost of repairs making it as good as new with respect to appearance and service.

APPEAL (418)—REVIEW—FINDINGS—TRIAL WITHOUT JURY. On a trial *de novo* on appeal, findings on trial without a jury are not conclusive, and upon estimates of a witness as to values, are of small controlling force.

DAMAGES (93)—EXCESSIVE DAMAGES—INJURY TO PERSONAL PROPERTY. Evidence of a witness that an automobile had a market value of not over \$2,500, and after the accident would sell for \$1,750 to \$2,000, warrants a judgment for damages for no more than \$500.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered January 28, 1918, upon findings in favor of the plaintiff, in an action in tort, tried to the court. Modified.

Ellis Lewis Garretson, for appellants.

Grosscup & Morrow, for respondent.

MITCHELL, J.—On account of the negligence of appellants, respondent's automobile was damaged. The cause was tried without a jury. Findings, conclusions and a judgment in the sum of \$1,125 were made and entered in favor of the respondent.

At the trial, appellants proceeded on the theory that the proper measure of damages is the reasonable cost of repairs, and, over the objections of the respondent, introduced proof that the automobile could be repaired at a cost of \$125, in such manner as to make it as good as new with respect to service and appearance. The

¹Reported in 177 Pac. 786.

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Opinion Per MITCHELL, J.

proof showed an established market for second-hand automobiles. Therefore, the proper rule as to the measure of damages in the case is the difference between the market value of the automobile just before the injury and immediately thereafter. 8 R. C. L., § 47, page 487.

Other than the respondent, and simply because he owned the car, who, over the objections of appellants, was permitted to testify as to the market values, there was only one witness who gave such testimony. This witness was called by respondent. For ten years, at the time of trial, he had been in the automobile business, and for three and one-half years, agent for the sale of this particular kind of car, and was a dealer in second-hand cars in Tacoma, where the accident occurred. The testimony of this witness as to market values was somewhat uncertain. Being asked in direct examination as to the reasonable market value of the car before the accident, he answered: "That car would have sold for between \$2,700 and \$3,000." Questioned as to the market value after the accident, he said: "Well, if we would have bought it, we would not have paid over \$1,500 or \$1,600 for it." Under cross-examination he testified: "Q. And is your idea of what it was worth before the accident based upon what you as a dealer in second-hand cars would have been willing to pay for it? A. A dealer, probably he would not pay over \$2,500 or \$2,600 for it." Then, on redirect examination, he was asked: "Q. What would it sell for in the market after the accident?" to which he answered: "Around \$1,750 to \$2,000." Counsel for respondent say: "The trial court saw the respondent's witnesses, heard their testimony, and passed upon their credibility. Having made findings in favor of respondent, such findings will not be disturbed on appeal."

The statute, Rem. Code, § 1736, provides for a trial *de novo* in the supreme court in actions legal or equitable tried by the court below without a jury; thus charging us with the duty of deciding as the pleadings and proof impress us. Because of the usual advantage the trial judge has of observing witnesses as they testify, much respect is given to his findings, but they are not conclusive. *Williamson Investment Co. v. Williamson*, 96 Wash. 529, 540, 165 Pac. 385, 390. Here the most important question is the amount of damages proven, which depends most largely upon cold figures furnished by one witness. It is likely that the findings of the trial judge are of as little help to us in such a case as this as any where witnesses testify in person before the trial judge. In our consideration of the case we give to the witness full credit as to his knowledge and fairness, take his own estimates, and arrive at a conclusion different from that of the trial judge. This witness was called by respondent. We view his testimony, varying as to amounts, as admitting, in effect, that the market value of the automobile just prior to the accident was as low as \$2,500, and as much as \$2,000 immediately after. The car, though well cared for, had been in use fifteen months. We are satisfied from the whole record that the damages amounted to only \$500.

The cause is remanded with instructions to the lower court to enter judgment in favor of respondent in the sum of \$500.

Appellants will recover their costs of the appeal.

MAIN, TOLMAN, and MACKINTOSH, JJ., concur.

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Opinion Per TOLMAN, J.

[No. 14922. Department One. January 17, 1919.]

MATTA MILLER, *Administratrix etc., et al.*, Appellants,
v. GREAT NORTHERN RAILWAY COMPANY,
*Respondent.*¹

APPEAL (465)—REVIEW—HARMLESS ERROR—INSTRUCTIONS—CURE BY VERDICT. In an action brought for wrongful death under the Federal liability act, an instruction that contributory negligence would be a defense is harmless error, where there was no evidence of negligence to sustain any verdict for the plaintiff and the jury found for the defendant.

MASTER AND SERVANT (55)—NEGLIGENCE—OPERATION OF RAILROADS—LOOKOUT—EVIDENCE—SUFFICIENCY. In an action under the Federal liability act for the wrongful death of an employee, struck by a train pulling into a station, there was no evidence of negligence in the failure of the train crew to keep a lookout for the deceased, where the undisputed testimony shows that the engineer on the train kept a lookout except for two or three times when he pulled his head into the cab because of snow flurries, and the fireman had his head out of the cab all of the time and kept a constant lookout; especially where there was nothing to indicate that failure to keep a lookout was the proximate cause of the death.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 2, 1918, upon the verdict of a jury rendered in favor of the defendant, in an action for wrongful death. Affirmed.

Robertson & Miller and *E. W. Robertson*, for appellants.

Thomas Balmer and *E. J. Prickett*, for respondent.

TOLMAN, J.—Appellant brought this action on behalf of herself and her minor son, under the Federal employers' liability act (Act of Congress, April 22, 1908, c. 149, § 2; 35 Stat. 65; U. S. Comp. St. §§ 8657-8665) to recover damages for the death of her husband, Thomas Miller, a Great Northern conductor,

¹Reported in 177 Pac. 799.

who was killed at Browning, Montana, on the night of January 7, 1913. The case was tried to a jury, which found a verdict in favor of respondent, upon which judgment was entered, and from which this appeal is prosecuted.

Appellant assigns as error the giving of certain instructions, and has brought here as a part of the record a statement of facts, which is certified by the trial court to contain "all the material facts, matters and proceedings heretofore occurring in said cause, and not already a part of the record therein, in so far as the same is necessary to cover and explain instructions Nos. 6, 11, and 12, contained in the foregoing bill of exceptions."

The facts shown by this record are that, on the night of his death, Thomas Miller, the husband of appellant, rode "deadhead" into Browning, Montana, from Summit, a station twenty-four miles west, on a snow dozer in charge of conductor Dewar. A blinding snowstorm was raging, and the trains and snow-plows were being run a telegraph block apart to avoid collisions. Second No. 4, a first-class east-bound train, was held at Glacier Park, the first telegraph station west of Browning, until the arrival at Browning of the dozer was reported. Arriving there at about 10:35 p. m., conductors Dewar and Miller walked together to the telegraph office to report their arrival, so that orders could be given for second No. 4 to proceed from Glacier Park to Browning. Miller was present in the office, close to the operator, and heard the order transmitted. Miller then took charge of a Russell snow-plow standing on the passing track near the depot, being informed by the train master that he was to run with this snow-plow to Kipp and return to Browning ahead of second No. 4. The train mas-

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ter asked the dispatcher to issue an order to Miller to carry out these instructions. While waiting for the order, it was reported that conductor Dewar, in attempting to turn his engine and snow dozer on the "Y," had become stalled, and the train master directed Miller to take his engine and assist Dewar through the snow-drift. This Miller proceeded to do, and thereafter told his brakeman to couple his engine back to the snow-plow, and he himself started to the telegraph office with the train master to get his orders. On their way there, the train master heard second No. 4 whistling on its approach from the west. Entering the telegraph office, they found an order for conductor Miller to run extra to Kipp and return to Browning, with rights over all trains. Miller signed this order, but under the railroad rules, it did not become effective until the operator had repeated it, with the conductor's signature, to the dispatcher, and had received from the dispatcher the word "complete," with the time. When so completed it was ready for delivery to the train crew, with a clearance stating that there were no further orders for them, upon receipt of which they could leave Browning.

While in the telegraph office, at the time Miller signed this order, there was present besides Miller and the train master, the operator who was just going off duty, and the operator who had just come on duty; and the testimony of all is in complete accord and to the effect that, just as Miller signed the order, the dispatcher asked the operator over the phone if he could see anything of second No. 4, and the operator replied, seeing the headlight of the approaching train from where he sat, "Second No. 4 is coming," or "She is coming now," or words to that effect. Miller

was standing where he could hear this conversation, and every one seems to have understood that second No. 4 was then coming in. Under these conditions, Miller said to the train master that he would go out and see if his crew was ready to start, and asked the train master to bring out the orders to him as soon as they were completed, to which the train master assented; and Miller went out of the door, pulling his cap down and turning up his coat collar as he went out. This was the last seen of Miller alive. The order for which he had been waiting was made complete at 11:20 p. m., two or three minutes after he left the office, and the train master took the order and a clearance card for delivery to Miller. In the short interval between Miller's passing out of the office and the completion of the order, second No. 4 had pulled into the station, and the engine had stopped about flush with the farther end of it. When the train master passed out with the orders and clearance card, he went around the front end of the engine on second No. 4, standing on the main track, to the snow-plow and engine in charge of Miller's crew on the passing track, but Miller was not there, and had not been seen by any member of his crew. A search was immediately instituted, which resulted in finding Miller's dead body lying under the pony trucks at the head of the engine on second No. 4. Marks made in the snow indicate that his body had been dragged a distance of some thirty or forty feet from the point where he was struck to that where the body was found. The men on the engine of second No. 4 testified as to the wind and flurries of snow interfering with their vision at times; that the whistle had been blown for the station and for an intervening crossing; that the bell was ringing at all times from

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the west end of the yard until the train came to a stop; that the electric headlight was burning, and continued to burn until the train came to a full stop, though there was some evidence that it flickered and jumped just before the train reached the station. Both the engineer and the fireman kept their heads out for the purpose of looking ahead, except that, as the flurries of snow occurred, they temporarily withdrew behind the protection of the glass windows of the cab; and the fireman, also, in passing the coal chute and the water-tank on his side, kept his head within the cab for the purpose of avoiding contact therewith and with the icicles hanging from the water-tank. The engineer testifies that, from the time of passing the coal chute, located about 225 feet west of the station, until the train stopped, he pulled his head into the cab two or three times because of the snow flurries. And the fireman testifies that, from the time of passing the water-tank, which was about 150 feet west of the depot, he put his head out of the cab, kept it out, and maintained a constant lookout until the train stopped. Neither saw anything of Miller, or had any knowledge that he had been struck, until his dead body was found.

In answer to special interrogatories which were submitted, the jury found that the headlight was burning all the time until the train stopped at the station, that the bell was ringing, and continued to ring until the train stopped at the station, and further, that the deceased, Thomas Miller, at the time when he left the station on his way to his own train, knew that second No. 4 was in sight and approaching the station. The jury, however, failed to answer the interrogatories submitted upon the question of whether a proper lookout was maintained.

The first assignment of error relates to instruction No. 6, in which the jury was told that, if the deceased knew, or in the exercise of reasonable care should have known, of the approach of the train, either through the blowing of the whistle, the ringing of the bell, the light from the headlight, or by being told, then there was no negligence on the part of respondent for which recovery could be had. While this instruction would have stated the law in a case not brought under the Federal employers' liability act, here it was inapplicable because of the comparative negligence rule recognized by that act (35 Stat. 66; U. S. Comp. St. 1916, § 8659); and if there was evidence from which the jury might have found that respondent was negligent, appellant might still have been entitled to a verdict, notwithstanding knowledge on the part of the deceased of the approach of the train, because contributory negligence which would defeat a recovery under the state law might reduce the recovery under the Federal act, but would not necessarily defeat it. The special findings of the jury upon the questions of the burning of the headlight and the ringing of the bell eliminate all grounds of negligence charged except the single one of a failure to keep a lookout, and if there was no such failure, then the instruction, though erroneous, was harmless error.

Assuming that the duty exists upon a first-class train, coming into a station over the main line at a speed of two to four miles per hour, with the headlight burning and the bell ringing, to keep a lookout for employees of the company who knew of its approach, and whose duty it was to keep out of its way, which may well be doubted, the undisputed testimony here shows such lookout to have been maintained in as efficient a way as the elements, over which the

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company had no control, would permit. And even on a night when a severe storm was raging, the proof as here shown contains no element of negligence, nor is the inference of negligence to be drawn from any fact shown. What further precautions could have been taken is not suggested, and it is difficult to imagine anything further which could have been done, unless the train was brought in under flag, and that certainly would be an unreasonable condition to impose where the surroundings were as they were shown to be here, with no public crossing intervening, and no danger to be apprehended to any one except the company's employees, whose duty it was to know of the approach of the train and to give it a clear track. Furthermore, if it were possible to draw an inference of negligence in this respect from the evidence, there is nothing to indicate that such negligence was the proximate cause of Miller's death. He might, and probably did, step into danger in such a manner and at such a time that, even if the engine crew had seen him, it would have been impossible to bring the train to a stop, or for them in any manner to have avoided the accident.

After a careful study of all of the testimony brought here, which is certified to be all that is material upon the point under discussion, we are satisfied that there was no conflict in the evidence as to the lookout maintained, and that the minds of reasonable men could not differ as to the conclusions to be drawn therefrom. The jury, by its answers to the special interrogatories, has resolved all of the other issues in the case against appellant, and since the court might, and should, have withdrawn the issue of whether a reasonable lookout was maintained, from the consideration of the jury, the error in the instruction given was harmless.

What has been said disposes of all of the other errors assigned. The jury was permitted to pass upon the only disputed questions of fact in the case, the verdict and answers to the interrogatories returned by it seem to be conclusions which were inevitable from the evidence submitted, and the judgment must be affirmed.

Judgment affirmed.

CHADWICK, C. J., MACKINTOSH, MITCHELL, and MAIN, JJ., concur.

[No. 14969. Department One. January 17, 1919.]

WILLIAM R. ARMSTRONG *et al.*, *Respondents*, v.
MODERN WOODMEN OF AMERICA, *Appellant*.¹

INSURANCE (83)—AVOIDANCE OF POLICY—FRAUD—MISREPRESENTING AGE—EVIDENCE—SUFFICIENCY. Upon an issue as to misrepresenting the age of insured, a verdict finding that he was born in 1862 as represented, instead of 1858, is supported where witnesses testified in person to that effect, although they were mistaken as to the place of birth and were contradicted by numerous witnesses, the question being for the jury.

EVIDENCE (23, 101)—PRESUMPTIONS—CAPACITY TO CONTRACT—ADMISSIONS AGAINST INTEREST. Upon an issue as to whether insured was born in 1862 as represented, or in 1858, his contract made in 1880 with his father is not competent evidence that he was twenty-one at that time, as either raising a presumption that he was competent to contract, or as an admission against interest.

APPEAL (458) — REVIEW — HARMLESS ERROR — FACTS OTHERWISE ESTABLISHED. Error in the exclusion of evidence as to what a deceased wife had told witness as to the date of her birth is harmless where he testified as to her age from his own knowledge.

EVIDENCE (100)—DECLARATIONS—BY PERSON SINCE DECEASED—AGE. Upon an issue as to whether insured was born in 1862 as represented, or in 1858, evidence by insured's son that insured, before making the application for insurance, always claimed he was born in 1862, is admissible.

¹Reported in 178 Pac. 1.

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EVIDENCE (34)—BURDEN OF PROOF—SHIFTING—PRIMA FACIE CASE. Upon an issue as to whether insured was born in 1862 as represented, or in 1858, proof of death stating that he was born in 1858, while making a prima facie case, does not shift the burden of proof.

CHADWICK, C. J., dissenting.

Appeal from a judgment of the superior court for Whitman county, McCroskey, J., entered December 27, 1917, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on a benefit certificate. Affirmed.

Arthur W. Davis, Charles L. Chamberlin, and Truman Plantz, for appellant.

John Pattison and J. P. Burson, for respondents.

TOLMAN, J.—This action was brought to recover upon a benefit certificate issued by appellant, Modern Woodmen of America, in 1903, to George E. Armstrong, who, in his application for membership, stated that he was born on the 10th day of July, 1862. George E. Armstrong died on the 11th day of February, 1913, and proof of his death was submitted, in which it appeared that Armstrong was born on the 10th day of July, 1858. Payment was refused because of alleged misrepresentation of the age of deceased, and that fact was pleaded as a defense to the action. Trial was had to a jury, which found a verdict in favor of respondents for the full amount of the benefit certificate, and interest. A motion for new trial and a motion for judgment *non obstante veredicto* were interposed. In the latter motion, appellant asked the trial court to enter judgment for respondents in the sum of \$196.75, being the amount of the assessments paid by the deceased under the benefit certificate. Judgment was entered on the verdict, from which this appeal is taken.

This case was here on a former appeal from a like verdict and judgment, and is reported in 93 Wash. 352, 160 Pac. 946, to which reference is made for a more complete statement of the facts.

Appellant first contends that there was no substantial conflict in the evidence, and that the trial court should have decided, as a matter of law, upon the motion for judgment *non obstante*, that deceased misrepresented his age in his application for membership in the order. We have examined the evidence with painstaking care and find that one witness, by deposition, testified that deceased was born in 1858, and six other witnesses, also by deposition, testified to facts strongly indicating that to have been the year of his birth. This, with the admission of the marriage license issued to deceased in 1882, for the rejection of which the case was reversed on the former appeal, reciting that he was then over the age of twenty-one years, and the testimony of an uncle, Charles Armstrong, produced in person as a witness by respondents, to the effect that deceased was born not earlier than 1860 or 1861, might well have justified the jury in finding that he misrepresented his age in his application.

Upon the other hand, two witnesses testified in person that deceased was born in 1862, and were cross-examined at length before the jury, and two witnesses testified by deposition to facts indicating 1862 to have been the year of deceased's birth. While this evidence is, in a measure, discounted by the fact that both of these witnesses who testified in person located the birthplace of deceased as having been in Clark county, Missouri, and ten or a dozen witnesses, including all the relations, fixed his birthplace as Scotland county, Missouri, yet both of these witnesses certainly knew deceased in his early childhood in Macon

county, Missouri, and the question of their credibility was for the jury.

On the former appeal we held that there was substantial evidence upon which the verdict of the jury could rest, and in the last trial the only material change in the testimony is the admission of the marriage license of deceased and the testimony of several additional witnesses to the effect that deceased was born in Scotland county, or that his parents did not live in Clark county at the time of his birth. As the recital in the marriage license is by no means conclusive, and as the place of birth does not go directly to the time of birth, and the evidence in this respect was offered more for the purpose of discrediting the testimony of respondents' witnesses than to establish the facts in issue, we do not feel justified in disregarding the verdict of the jury and substituting our judgment upon the facts. As was said in our former decision of this case:

"Whatever the rule may be in other jurisdictions, it is well settled in this state that, where a cause is tried to a jury, and the trial court declines to grant a new trial in response to the contention that the verdict is against the weight of the evidence, this court will not disturb the holding of the trial court, even though it may believe that the weight of the evidence is against the verdict of the jury, unless it shall appear that the trial court abused its discretion in refusing to grant a new trial. *Mattson v. Eureka Cedar Lumber & Shingle Co.*, 79 Wash. 266, 140 Pac. 377; *Independent Brewing Co. v. McCrimmon*, 85 Wash. 610, 148 Pac. 787; *Payzant v. Caudill*, 89 Wash. 250, 154 Pac. 170."

It is contended that the trial court erred in rejecting a certified copy of an agreement, dated May 25, 1880, between Robert W. Armstrong and Edwin Armstrong, by which the former transferred to the latter

all of his personal property in consideration of his own support during his lifetime and the support of the grantor's youngest children until they should be capable of self-support, arguing that, because an infant is under disability to contract, this contract would be evidence that Edwin Armstrong was an adult at the time of its execution. Aside from the fact that the paper was in nowise identified and that there is nothing but the similarity of names to connect it with the deceased and his father, we think it not competent evidence of the age of the deceased. While in an action upon a contract the law will presume the maker to have been competent to bind himself, until the contrary is shown, yet, assuming that Edwin Armstrong, therein named, was in fact the deceased, we do not think this can be regarded as an admission by him against interest, or that any presumption necessarily arises therefrom as to his age. A minor's contracts are voidable only, not void, and the father might have many reasons to emancipate the son and convey property to him during his minority. For these reasons, and because he had already testified to a lack of knowledge on the subject, it was not error to limit the cross-examination of the witness Charles Armstrong with reference to this contract.

We find no error in the ruling sustaining an objection to the question as to what the deceased wife of the witness Riebel had told him was the date of her birth, or what the family record showed her age to be. In any event, the witness was permitted to testify as to his wife's age from his own knowledge, and as he fixed her age in accord with appellant's contentions, appellant was not in anywise injured by the ruling complained of.

Again, it is urged that it was error to permit Walter Armstrong to testify to a conversation which occurred

some eighteen or nineteen years before between his father and mother regarding the father's age, and that his father then and always claimed that he was born in 1862. This testimony relates to a time prior to the making of the application for membership involved here, and apparently was made at a time when there was no reason for speaking other than the truth. We think the evidence admissible. 2 Wigmore, Evidence, § 1482.

Finally, it is contended that the proof of death, which stated deceased was born in 1858, made a *prima facie* case and shifted the burden of proof, and that the court should have so instructed the jury. We said in *Smith Sand & Gravel Co. v. Corbin*, 75 Wash. 635, 135 Pac. 472:

"Some contention is made rested upon the alleged shifting of the burden of proof. It is said that the admission of the making of the contract on the part of respondent, in effect, constituted the making of a *prima facie* case against him; upon which counsel seem to argue that this resulted in shifting the burden of proof. We do not understand that the establishing of a *prima facie* case sufficient to go to the jury has the result of shifting the burden of proof. The jury are not necessarily bound to find for the plaintiff upon the making of a *prima facie* case. *Prima facie* case means only that the case has proceeded upon sufficient proof to that stage where it must be submitted to the jury, and not decided against the plaintiff as a matter of law. A *prima facie* case does not necessarily mean that judgment goes in favor of the plaintiff as a matter of law. The jury are still the judges of the sufficiency of the showing to call for a verdict in plaintiff's favor, and where there is no affirmative defense, strictly speaking, the jury are to measure plaintiff's rights, having in view that he has the burden of proof."

Finding no error, the judgment is affirmed.

MITCHELL, MACKINTOSH, and MAIN, JJ., concur.

an undisclosed principal, the plaintiff claiming to be the principal and vendee for whom Gale was acting. Trial upon the merits in the superior court for Kitsap county resulted in judgment denying to the plaintiff the relief prayed for, from which he has appealed to this court.

The contract, in so far as we need here notice its terms, reads as follows:

“Bremerton, Washington, August 21, 1917.

“Received of Edgar L. Gale (agent for undisclosed principal), hereinafter mentioned as the purchaser, the sum of one hundred (\$100) dollars, as earnest money in part payment for the purchase of (here follows description of property) which I have this day sold to the said purchaser on the following terms, to wit: the total purchase price of said fixtures (described property) to be the sum of fifteen hundred (\$1,500) dollars, and in addition to said sum, the said stock of goods, wares and merchandise to be inventoried and paid for by the purchaser at the invoice price as shown by the invoices at the time of the purchase by the undersigned, the vendor herein.

“An inventory of said stock of goods, wares and merchandise shall be taken at the invoice price at the time of the purchase of said stock of goods, wares and merchandise, by the vendor herein, as shown by the *invoices*; it being understood that the undersigned, the vendor herein, will immediately upon demand, turn over to the said Edgar L. Gale, or to whoever he may designate, immediate possession of said storeroom and of said invoices and whatever may be necessary to make a complete inventory of said stock of goods, wares and merchandise, fixtures and personal property located in said storeroom, and that said inventory and sale shall be completed on or before August 31, 1917, and upon completion thereof, possession of said premises shall be immediately surrendered by the vendor to the vendee, or to whoever he may designate. . . .

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"It is further understood and agreed that the said Edgar L. Gale, agent (or his undisclosed principal) shall not in any manner be held responsible for any damages of any nature whatsoever on account of the failure to complete the sale within the time and in the manner hereinabove set forth, or at all, and in the event that said sale is not completed on or before August 31, 1917, without fault of the vendor, the said sum of one hundred (\$100) dollars, hereinabove mentioned, shall be forfeited and considered as full and liquidated damages by the undersigned.

"In witness whereof, I have hereunto set my hand and seal the day and year first above written.

"(Signed) J. A. Knabb."

A check for the earnest money in the sum of one hundred dollars was, at the time of the signing of the contract, given by Gale to Knabb, which was never cashed, but was surrendered by Knabb, filed as an exhibit in the case, and is attached to the statement of facts.

The principal defense made by Knabb, and the only one we find it necessary to notice, is that of fraud and deceit practiced by Gale inducing Knabb to sign the contract, in that Gale stated and represented to Knabb that Cohn was not his undisclosed principal, well knowing that Knabb would not sell to Cohn on the terms and conditions specified in the contract. The trial judge stated his reasons for rendering judgment in favor of Knabb in what is, in effect, a finding embodied in the judgment, as follows:

"That the agreement set forth in the complaint was signed by the defendant herein under a verbal condition precedent to his signing of the same that in no case was the subject-matter referred to in said contract to be sold to Jake Cohn. . . ."

Counsel for Cohn contends that the trial court fell into error in so finding and making such finding the

basis of its judgment. The evidence is not free from conflict touching the question of this verbal understanding between Knabb and Gale at the time of the signing of the contract, but we think it was ample to warrant the court in viewing the fact as stated in the judgment. The evidence also warrants the conclusion that Cohn was purposely acquiescing in concealing by Gale from Knabb the fact that Cohn was the undisclosed principal for whom Gale was acting, well knowing that Knabb would not sell the business to him under the terms of the contract.

Counsel for Cohn invokes the rule as stated in *Scott v. Shiner*, 27 N. J. Eq. 185, 189, as follows:

“To constitute a misrepresentation which will prevent a decree for specific performance, the statement in question must be so material to the contract built on it, that, if the statement be false, the contract becomes one which it would be unconscionable for the party who has made the statement to enforce. In other words, the misrepresentation must be shown to have operated to the prejudice of the defendant.”

Conceding this to be the law, speaking generally, we think it is not controlling in this case. It appears from the evidence that Cohn and Knabb had for a considerable time been competitors in business, with some ill-feeling existing between them, their stores being within two or three doors of each other, and that Knabb did not have such faith in the business integrity of Cohn as would induce him to contract for a sale of the business to Cohn upon such terms and conditions as were specified in the contract here in question, all of which was known to Gale. It will be noticed that the consummation of the sale under this contract involved something more than the mere delivery of the business and the stock and receiving an agreed fixed price therefor, since, by the terms of the

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contract, Cohn would have the privilege of participating with Knabb in making an invoice of the stock, and thereby in a measure cause interference with Knabb's business before the consummation of the sale, with the possibility of Cohn still refusing to purchase, as to which Knabb would be dependent upon the good faith and ability of Cohn to purchase. We think, in view of the fact that the contract was executory to this extent, that Knabb was well within his rights in refusing to proceed with the invoicing of the stock and the sale to Cohn upon discovering that he was the undisclosed principal for whom Gale was acting. It may be that Knabb took his chances as to who the undisclosed principal was for whom Gale was acting, other than Cohn, but this is not so as to Cohn. The following authorities lend support to our conclusion: *Mitchell v. King*, 77 Ill. 462; *Kelly v. Central Pac. R. R.*, 74 Cal. 557, 16 Pac. 386, 5 Am. St. 470; *Fox v. Tabel*, 66 Conn. 397, 34 Atl. 101; *Rodliff v. Dallinger*, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439; *New York Brokerage Co. v. Wharton*, 143 Iowa 61, 119 N. W. 969.

The judgment is affirmed.

MAIN, MOUNT, HOLCOMB, and FULLERTON, JJ., concur.

[No. 15042. Department One. January 17, 1919.]

F. M. HASKELL *et al.*, as *Haskell Plumbing Company*,
Respondents, v. CARLISLE PACKING COMPANY,
Appellant.¹

TRIAL (29)—RECEPTION OF EVIDENCE—REBUTTAL. Where the plaintiff's evidence in chief showed good workmanship in the manufacture of tanks for the defendant, and defendant's evidence showed they were leaky, it is proper rebuttal for the plaintiffs to show an admission by the defendant's plumber that he had caused the leakage.

EVIDENCE (52, 93)—STATEMENTS OF AGENT—RES GESTAE. Upon an issue as to the cause for the leakage of gasoline tanks manufactured by the plaintiffs for the defendant, evidence that defendant's plumber, while engaged in connecting up the tanks, stated that he had broken a lug and obtained materials for stopping the leak is admissible as a declaration by an agent within the scope of his employment, and also as part of the *res gestae*.

SALES (127, 128)—ACTION FOR PRICE—DEFENSES—SET-OFF—DEFECTS. Where gasoline tanks manufactured for defendant had a substantial value, and are retained by the defendant without giving plaintiffs an opportunity to repair or remove them, he cannot defend an action for the price on the ground of defective workmanship, but must pay the price with the understanding that plaintiffs would be liable for damages for breach of warranty if they were not fit for the use for which they were made.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered March 6, 1918, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

Will J. Griswold, for appellant.

Sather & Livesey, for respondents.

MITCHELL, J.—This action was instituted by the F. M. Haskell Plumbing Company, a partnership, to recover a judgment against defendant for the sum of

¹Reported in 177 Pac. 780.

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\$705, the contract price for labor and material in building seven gasoline tanks for defendant's boat, in Whatcom county. The case was tried to a jury, and resulted in a verdict and judgment against defendant for the sum of \$705. Defendant has appealed from the judgment.

The complaint set forth the manufacture and delivery of the tanks and the failure of appellant to pay the purchase price. Appellant, in its answer, admitted the contract and receipt of the tanks, but denied all liability and indebtedness, claiming the tanks were improperly built and of no use to it. Further answering, and by way of affirmative defense, it alleged that, after commencing to build the boat, the contract for the tanks was let, by which respondent was to furnish the material and construct the tanks and install them in the boat for the purpose of carrying gasoline as fuel for the boat, which was to engage in fishing in Alaskan waters during the season then near at hand; that, upon taking the boat to Seattle and attempting to fill the tanks with gasoline, it was discovered that they had been constructed in such unworkmanlike manner they would not hold gasoline, could not and have not been used; that the defective condition of the tanks caused five days' delay in Seattle in having an expert examine them to determine if they could be repaired, and in procuring drums to carry gasoline, upon concluding the tanks could not reasonably be repaired, causing damages in the sum of \$150, wages of the boat's crew; that such defective condition of the tanks necessitated the purchase of drums in the sum of \$600 to carry gasoline, after which use they were worth only \$150; and that the placing of the drums containing gasoline on the deck of the boat prevented the taking of other freight, to

appellant's damage in the sum of \$300. Appellant demanded judgment in the sum of \$900. The reply denied the affirmative matter pleaded in the answer.

Upon many points there was a conflict in the evidence, but from all of it, whether disputed or not, the jury might well have found the facts to be substantially as follows: Respondent had built tanks for appellant prior to the ones in question, according to a blueprint furnished. The present tanks were to be built in the same manner but of different size than the blueprint called for. Completed, they contained \$500 worth of material and \$205 worth of labor. They were built and placed in the boat by respondent, as the contract called for, while the boat was being constructed, just a few days before starting on the Alaskan trip. Respondent knew what they were to be used for, and usually such tanks are tested; these were not tested, appellant's officers saying they felt sure they would be all right. Respondent had nothing to do with connecting up the tanks, after they were put in place, by feed-pipes for flow of the gasoline through them. This was done by appellant, and while its plumber, or head fitter, as he is spoken of, was connecting up the tanks, he went to one of the persons who had helped respondent build the tanks and asked for and got a ladle and wiping cloth, saying he had broken a lug off the tank and wanted to wipe it on again. A ladle is used to dip solder with, and a wiping cloth is a piece of ticking folded in thicknesses to place and wipe metal any place needed, and, among sheet-metal workers, a lug is a projecting piece or threaded nut on the tank to receive a connecting or feed-pipe.

Within a few days after receiving the tanks, appellant had six of them connected up. The boat was then taken to Seattle for gasoline, when it was found the tanks would not hold it, and the six tanks have

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never been used by appellant. The boat and crew remained in Seattle five days at an expense of \$100. Fifty drums, at \$12 each, were procured by appellant to carry needed gasoline, although twenty-eight of them had as much capacity as the tanks, which drums, at the time of trial, were worth five or six dollars each. Upon discovering that the tanks leaked, respondent was notified of the fact, but also notified that the boat had already sailed to Alaska. The tanks have never been tendered back to respondent, nor has respondent been offered an opportunity to take them out of the boat. At the time of the trial, six of the tanks could not be used by appellant for the purpose intended, but they possessed substantial value. One of the seven tanks received by appellant has never been objected to nor paid for.

Concerning the testimony above referred to, wherein appellant's head plumber asked for and received of respondent's witness a ladle and wiping cloth, saying he had broken off a lug, it should be further stated that he told the witness he was doing the plumbing work connecting the tanks in the boat, and the witness shortly after, and on the same day of that conversation, saw him actually engaged at that work. Appellant claims, however, that the admission of this evidence constituted error because improper in rebuttal, and also because it was hearsay. We think there was no error. In chief, respondent had shown good workmanship on the tanks, which appellant had answered with testimony showing a leaky condition of six of the tanks at a later time, hence it was proper for respondent to then show facts which may have reasonably caused that condition. Nor was the testimony hearsay. First, because it was in the nature of an admission or declaration made by appellant's agent

and employee within the scope of his authority and having relation to, and connected with, the transaction in which he was then engaged (1 R. C. L., § 49, page 508; Id., § 53, page 512; *Willcox v. Hines*, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. 761); and, second, the statement was admissible as part of the *res gestae*. It was made by appellant's employee at a time he was actually doing the work of connecting the tanks, and when he desired the articles to resolder the lug which he said he had broken off. *Roberts v. Port Blakeley Mill Co.*, 30 Wash. 25, 70 Pac. 111; *Walters v. Spokane International R. Co.*, 58 Wash. 293, 108 Pac. 593, 42 L. R. A. (N. S.) 917.

The jury was instructed to the effect that, if the tanks were defective, as alleged by appellant, then the appellant had the right under the law to refuse to keep them, but that, in such case, it was under obligation to return them or give respondent an opportunity to get them, if labor was required to take them out of the boat, considering the manner in which they had been installed; that, while appellant had the right to presume the tanks were reasonably suited for the purpose for which they were sold and delivered, and was entitled to a reasonable opportunity after receiving them to test them, it was its duty, nevertheless, if the tanks were found to be defective, to so notify respondent within a reasonable time, and thus afford an opportunity to repair them, else deliver them back or give an opportunity to take them down in the boat and remove them; and that the purchaser of an article having intrinsic value may not appropriate it to his own use and defend against an action for the purchase price on the ground it was not of a quality called for; that such course could be pursued by a purchaser only in a case where the article is worthless for any purpose.

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Appellant claims that portion of the instruction was erroneous which related to the duty of the purchaser to give the other party an opportunity to repair, or else return, or offer to return, the articles, or to give the other party an opportunity to remove them, unless they were entirely worthless for any purpose. The instruction must be considered in the light of the evidence, the pleadings and all other instructions given. Appellant admits the tanks had value, but claims they were unfit for the purpose intended. By its answer, though admitting the contract, it does not confess liability for the price and then seek to counterclaim, recoup or, by cross-complaint, set off damages claimed to have been suffered on account of a breach of warranty, express or implied, that the articles were suitable for the purpose intended, but it denies liability altogether, simply because the tanks cannot be used for the purpose of holding gasoline, and at the same time, by a pleading denominated an affirmative defense, demands all damages caused by an alleged defective condition of the tanks, and at the same time keeps the tanks, which possess real substantial value. The articles as they are, by confession of appellant, constitute property of value. If appellant continues to exercise ownership and dominion over the property, then it must pay that price provided for in the contract by which it got possession, with the understanding that respondent would be liable for damages for a breach by it of the warranty that the articles were fit for the use for which they were made. The rule applicable in this case is as follows:

“In order to bar a recovery of the price, the goods must have been returned or tendered, unless they are worthless for any purpose, and it is not sufficient that they are worthless for the particular purpose for

which they were sold." 35 Cyc. 436, 437, and cases cited.

Appellant, in criticizing the instruction, relies upon a rule announced in many cases, including the case of *Fuller & Co. v. Harris*, 48 Wash. 519, 93 Pac. 1080, to the effect:

" 'The purchaser of an article purchased under a warranty is under no obligation to return the same on discovery of breach of a warranty, but may affirm the contract, retain the goods, and recover his damages, arising from the breach of warranty in an action brought by the seller for the purchase price, if any such damages he has sustained.' "

There is no conflict between the rule announced in those authorities and the instruction here complained of. That rule is intended for a different kind of a case than the one presented by the pleadings in the present case. It is obvious from a mere casual reading of that rule that the words "affirm the contract" necessarily mean liability for the *purchase price*, as well as the right to retain the article purchased.

There was no error in giving the instruction complained of. It was proper on respondent's theory that there was no defect in the tanks as manufactured and delivered, as well as that of appellant to the effect that they still retained substantial value. On the other hand, the court was mindful of appellant's claim for damages by instructing the jury, in effect, that, if satisfied the contract was made and entered into and not kept and performed by respondent, resulting in damages to the appellant, then appellant was entitled to recover whatever the evidence showed in the way of damages that reasonably followed the breach as a result and consequence of the defective construction of the tanks.

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Appellant complains of an instruction to the effect that there was no evidence in the case which would justify a finding for appellant on account of the item of \$300 for alleged loss of freight to Alaska, or any part thereof. Our attention has not been called to any testimony to show the instruction was incorrect. The record fails to show any dependable or substantial evidence to support any claim for such kind of loss.

Other assignments of error are based upon the refusal of the court to give two instructions requested by appellant. It is enough to say they were of such sort as to be improper, according to our views expressed herein on other points.

Considering the verdict in this case — it being for the full amount sued for — and all of the court's instructions, including the one that the burden was on the respondent to prove all controverted allegations of the complaint, it is manifest that the jury was satisfied by the evidence that the tanks were constructed and delivered in a good workmanlike manner, in which event appellant was not entitled to recover for any of its alleged damages.

Judgment affirmed.

CHADWICK, C. J., MACKINTOSH, TOLMAN, and MAIN, JJ., concur.

[No. 14500. *En Banc*. January 21, 1919.]

RASMUS THOMPSON, *Respondent*, v. R. B. REALTY
COMPANY, *Appellant*.¹

LANDLORD AND TENANT (81, 88) — CONSTRUCTIVE EVICTION — REPAIRS—CONSENT OF TENANT. A tenant cannot claim a constructive eviction by repairs and alterations undertaken at his request and for his benefit, especially where no claim was made until abandonment of the premises and suit brought; his remedy for delay or negligence being an action for damages.

SAME (87)—EVICTION—ACTS OF LANDLORD. The failure of a landlord while making repairs, to keep his promise to put in a new front does not amount to a constructive eviction.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 31, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for eviction. Reversed.

Jesse A. Frye, for appellant.

Geo. Olson and William A. Gilmore, for respondent.

CHADWICK, C. J.—Plaintiff was a tenant of defendant under a term lease. He occupied a storeroom, eighteen feet in width, in a building containing other storerooms. In the spring of 1916, the building needed repairs. The floor sagged, and it had been repaired once or twice at the request of plaintiff. To make repairs of a permanent character it was necessary to go to considerable trouble and expense. Defendant desired to put a basement under the whole building. This could not be done economically without strengthening the walls of the building. Plaintiff needed basement room, and had spoken to defendant about it before defendant decided to make the improvement. It was understood that defendant should provide a space 20 x 20 feet in the basement and fit it for plaintiff's

¹Reported in 177 Pac. 769.

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conveniences, with a stairway leading from the main floor. The plans also contemplated a stairway leading from the main floor to the balcony. When the desires of the defendant were made known to plaintiff, he agreed that the work should go on. According to his own testimony, when disassociated from the concomitant circumstances, he said that defendant might proceed if it would pay him such damages as he might sustain. The space in the basement and the stairways were for the benefit of plaintiff and for the convenience of his business. It was necessary to make a stairway leading from the street into the basement. Defendant proposed to put this stairway under the storeroom occupied by plaintiff. To do this it would be necessary to cut off part of his frontage. He objected to this, and plans were drawn for a stairway under another part of the building. The plans for this stairway were O. K.'d by plaintiff on the 16th day of June. The work was begun about the 20th of March and progressed from day to day. It was thought that the work might be finished by the middle or last of May. In order to carry on the work it was necessary to put in heavy timber supports along the edge of the wall and to cut holes through the ceiling. Plaintiff says he was complaining all the time, and it is true that the work was not finished in the time that the parties had calculated that it might be done. But he gave no notice of his intention to quit. On the contrary, he continued his business up to the middle of May, when he bought a padlock and locked the door. He put a sign up in the window saying that he would reopen about the 15th of June. He later changed this sign, saying that he would open up on the 15th of June, and a third sign saying that he would open his place of business as soon as the work was finished.

Notwithstanding the fact that he had agreed that the work might go on, and that he had O. K.'d the plans on the 16th of June, which would call for a further interruption of his business, and still without notice to defendant, plaintiff consulted an attorney. A complaint was drawn about the 20th of June, charging a constructive eviction as of the 15th day of May, and praying for damages for injury to property, lost profits, and loss of the term, aggregating the sum of \$18,500. On the second day of July, plaintiff moved his furniture and fixtures out of the building, and immediately thereafter served his complaint, which was the first notice defendant had of his intention to abandon the premises.

The case went to trial upon the general issues and some affirmative defenses. A jury returned a verdict for \$3,333. Judgment was entered on the verdict, and this appeal follows.

The facts relied on to make a constructive eviction are set out in the complaint as follows:

“That on or about March 20th, 1916, appellant, through its servants and agents, began the excavation of a cellar under the leased premises, and as part of such excavation work, removed the supports of the building occupied by respondent, cut holes through the floor, placed and erected supporting timbers along the walls, ceilings and floors in the restaurant, rendering same unsightly, causing plaintiff great inconvenience and annoyance, that it became impossible to properly conduct respondent's restaurant business because of the loud pounding and other noises and the causing of dust to arise and flow into respondent's place of business, and physical disturbances occasioned by appellant's work and actions, causing the premises to be unattractive to prospective patrons, unfitted the premises for the purpose for which they were leased, interfering with the enjoyment of meals by patrons, frightening great numbers of them away, and finally

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completely ruining respondent's business. That the matters and things alleged in this paragraph were done by appellant against the will and over the protest of respondent, and resulted in driving away respondent's patrons and the lessening of his business from day to day, from March 20th, 1916, until May 15, 1916, at which time his business became completely destroyed and ruined."

A diligent reading of the record convinces us that plaintiff has not made out a case, either in fact or in law. Without going into greater detail than is hereinbefore set out, it is enough to say that, however annoying the work may have been to plaintiff, everything that was done up to the time he fixes as the time of eviction, and up to the time that he vacated the premises, was with his consent. The locking of the door and keeping of the keys, the posting of the notices, and the approval of the plans for the stairway as late as June 16, is so inconsistent with the present claims of the plaintiff that a recovery would voice the doctrine that a man can recover for his own wrong rather than for the invasion of some right.

Plaintiff makes something out of the fact that he was promised a new front, and he says defendant, after taking out the old front, "slapped it right back up again." The parties do not entirely agree as to the understanding about the store front. It was repaired and the plate glass was put back. But, if plaintiff's testimony be taken as undisputed, it would not give a right of action as for a constructive eviction. In that event he would have had an action for such damages as might result to him under the contract that was made at the time the work was begun, and not otherwise.

Furthermore, and although we want to avoid disputed facts, we are convinced that, if the front was

not fixed to the entire satisfaction of plaintiff, it was because he did not keep his demands fixed in his own mind. To constitute a constructive eviction there must be an intention on the part of the landlord to evict.

“The intent with which the act is done may be an actual intent accompanying and characterizing the act, or it may be inferred from the act itself.” *Skally v. Shute*, 132 Mass. 367.

“Where the issue is whether or not there was an eviction of a tenant, the intention of the landlord is material.” 8 Ency. Evidence, 65.

The consensus of judicial opinion seems to be that the act must amount in law to a willful trespass, which is but another way of saying that an intent to regain possession must be shown, or that the landlord has so wantonly and willfully interfered with the quiet enjoyment of the tenant that an intent to oust will be presumed.

“Generally the question whether acts of the landlord in consequence of which the tenant abandons the premises amount to an eviction, is a question of law, and includes the question whether they constitute proof of the intent.” *Skally v. Shute, supra*.

It follows, if a tenant consents to repairs, a recovery upon the grounds of a constructive eviction cannot be had.

“Acts on the part of the landlord to which the tenant assents cannot be asserted by the tenant as constituting an eviction. This self-evident principle has been applied in the case of an entry by the landlord, with the tenant’s assent, to make repairs or improvements.” Tiffany, Landlord and Tenant, p. 1289, § 185.

See, also, 24 Cyc. 1132, 1148; *Olson v. Schevlovitz*, 91 App. Div. 405, 86 N. Y. Supp. 834; *Ludington v. Seaton*, 32 Misc. Rep. 736, 66 N. Y. Supp. 497; *Schloss v. Schloss*, 137 Mich. 289, 100 N. W. 392.

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This is especially so when no eviction is claimed until after the abandonment of the premises. We have had but recently to consider a case very similar to this one. In *California Building Co. v. Drury*, 103 Wash. 577, 175 Pac. 302, we say :

“There certainly had been no eviction by reason of the annoyance from rats, for, as we have seen, there had been no eviction claimed on that ground until after the vacation of the premises, and the respondent was entitled to an opportunity to remove the nuisance before the appellant would be entitled to vacate.”

Having consented that the repairs should be made, plaintiff could not recover as for a violation of the terms of his lease, for his remedy, if any, was for negligent performance, and of that there is neither plea nor sufficient proof.

Plaintiff's principal reliance is in *Wusthoff v. Schwartz*, 32 Wash. 337, 73 Pac. 407, where the court accepted a definition of constructive eviction drawn by the supreme court of Pennsylvania :

“The modern doctrine as to what constitutes an eviction is, that actual physical expulsion is not necessary, but any interference with the tenant's beneficial enjoyment of the demised premises will amount to an eviction in law.” *Hoeveler v. Fleming*, 91 Pa. St. 322.

But in the case relied on, it is clearly pointed out that the work was done in wanton disregard of the rights of the tenant, and the court found as a fact that there was no consent, either actual or constructive. Faith is put also in the case of *Hotel Marion Co. v. Waters*, 77 Ore. 426, 150 Pac. 865, where the same doctrine is announced and the *Wusthoff* case is cited with approval. But in that case the interference which amounted to a constructive eviction was without the consent of the tenant. Nor was it contended that there

was any consent, the theory of the defense being that the acts complained of must have been of such permanent character as to deprive the tenant of the beneficial enjoyment of the premises. Neither of these cases, and cases announcing like conclusions, can be accepted as controlling, for, as we have said, plaintiff, by his own testimony, shows that the repairs were largely for his benefit and were undertaken with his consent and in the expectation that his place of business would be better suited for the uses intended. The defendant having no right of action upon the theory advanced in his complaint, it follows that all questions going to the damages and the measure of damages have become academic.

We have preferred to treat the case as if the eviction was laid as of July 2d, the date of abandonment, for no eviction can occur without giving up possession. Plaintiff retained possession, however, for six weeks after the time he says he was evicted, *i. e.*, May 15, and if we were inclined to a technical holding, we might, without doing violence to any text or authority that has been called to our attention, hold that plaintiff had waived the acts complained of. 24 Cyc. 1130; 16 R. C. L. 686; *Barrett v. Boddie*, 158 Ill. 479, 42 N. E. 143, 49 Am. St. 172; *Schloss v. Schloss*, *supra*.

Reversed, and remanded with instructions to dismiss.

MACKINTOSH, HOLCOMB, PARKER, MOUNT, MITCHELL, and MAIN, JJ., concur.

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Syllabus.

[No. 14677. *En Banc*. January 21, 1919.]

CHAUNCEY WRIGHT, *Respondent*, v. SEATTLE GROCERY
COMPANY, *Appellant*.¹

FRAUDS, STATUTE OF (37)—SALE OF GOODS—MEMORANDUM—SUFFICIENCY. A memorandum showing the date, name and address of the purchaser and the statement of goods sold with the agreed price, is a sufficient compliance with the statute of frauds, although all the details are not stated and the complaint alleges an agreement partly oral and partly written.

APPEAL (389)—REVIEW—AMENDMENTS. Under Rem. Code, § 1752, requiring disregard of technicalities and amendments considered as made, defects in a complaint capable of amendment are not material when the cause was tried as if upon a sufficient complaint.

FRAUDS, STATUTE OF (38)—SALE OF GOODS—MEMORANDUM—SIGNATURE. Rem. Code, § 5290, requiring a note or memorandum of a sale of goods exceeding fifty dollars to be "signed by the party to be charged thereby" is satisfied where it is signed by and may be enforced against the seller, although not signed by the purchaser.

SAME (38)—SALE OF GOODS. The use, by the seller of flour, of a blank form, with its name printed at the top, filled out by its authorized agent showing the terms of the contract of sale, is a sufficient "signing" of the contract by the seller to satisfy the statute of frauds.

SAME (37) — SALE OF GOODS — MEMORANDUM — SUFFICIENCY. A memorandum of a sale of flour setting forth the purchaser and seller, the quantity and character of the goods, the price therefor and the date of sale, shows a complete contract and satisfies the statute of frauds, although time and place of delivery were not given.

SALES (34, 35)—DELIVERY—TIME AND PLACE. Where the time and place of delivery of goods sold are not specified there is a presumption of a reasonable time; and both parties doing business in the same city, a like presumption fixes that point as the place of delivery.

EVIDENCE (175)—PAROL EVIDENCE TO VARY WRITING—AMBIGUITY. Parol evidence explaining what was meant by "1 car" of flour, and showing amount contained in a car shipped at the time and the manner of shipment, does not alter or add to the written memorandum of sale answering the requirements of the statute of frauds.

¹Reported in 177 Pac. 818.

SALES (154-156) — ACTION FOR BREACH — DAMAGES. In an action for failure to deliver flour sold, where there was no dispute as to the market value of the brand sold, the question of market value should have been withdrawn, and the jury instructed to assess damages in a sum equal to the difference between the contract price and the market value.

PRINCIPAL AND AGENT (34) — SALES AGENT — AUTHORITY. The authority of an agent to make a sale of flour is sufficiently shown by evidence that he had been a salesman for the principal for six years, actively engaged in soliciting orders and making such sales, his authority never having been questioned before.

SAME (51) — AGENT'S RIGHT TO SUE. An agent acting individually in buying flour and making the contract, may sue thereon in his own name as the real party in interest.

MACKINTOSH, HOLCOMB, MAIN, and TOLMAN, JJ., dissent.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 3, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Elias A. Wright and Sam A. Wright, for appellant.

Leopold M. Stern and J. W. Russell, for respondent.

FULLERTON, J.—The sales agent of the appellant sold to the respondent a car-load of flour, and delivered to him a copy of a memorandum of the sale in the following form:

“Seattle Grocery Company (Incorporated.)

“Corner Western Avenue and Columbia Street.

“Phone Main 842.

“Seattle, Wash., April 6, 1917.

“Sold to Chauncey Wright,

“L. C. Smith Bldg., Seattle, Wash.

Coffee, Spices, ‘Halcyon’ Food Products,

1 Car Gold Medal Flour.....\$2,790.46.”

The memorandum of the sale was a printed blank form, on which was entered in writing, at the time of sale, the date, name and address of purchaser, and the statement of goods sold, with the agreed price. The

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appellant corporation failed to carry out the contract, and the respondent brought an action for its breach, demanding damages in the sum of \$1,859.54, being the difference between the agreed price and the sum of \$4,650, which was alleged to be the market value of the flour in Seattle, the place of delivery, at the time of the breach. On a trial before a jury a verdict was returned against the appellant in the sum of \$1,472.04, and from the judgment entered thereon, this appeal is prosecuted.

The record discloses the death of the respondent pending the appeal and the substitution of the executrix in his place and stead.

The first assignment of error necessary to be noticed is the assignment that the court erred in overruling the demurrer interposed to the complaint. In his complaint the respondent alleged that the contract of sale was "partly oral and partly written," and it is contended that this is fatal to the complaint, since, under the statute of frauds, the contract must be in writing, and that a contract partly oral and partly written is in law an oral contract. But we cannot think the objection tenable. In the first place, the contention misconceives the effect of the statute. The requirement is not that contracts of this sort must be in writing, but is that some note or memorandum in writing of the bargain be made and signed by the party to be charged. If, therefore, the note or memorandum shows the bargain, it is sufficient, even though all of the details of the agreement be not stated therein. But further than this, the defect, if defect it is, is one capable of amendment. The cause was tried as if upon a sufficient complaint, in which neither party was denied the right to introduce evidence because of the supposed defect. It would therefore be an idle ceremony to reverse the

cause and send it back for a new trial because of this defect in the complaint, even though we considered the objection well taken, since to do so would be but to allow an amendment to the complaint and a retrial upon the same evidence. Moreover, to do so would be to disregard that admonition of the statute requiring us to hear causes upon their merits, disregarding all technicalities, and to consider all amendments as made which could have been made. Rem. Code, § 1752.

The principal contention of the appellant is that the memorandum was not sufficient under our statute of frauds. The applicable provision of the statute is as follows:

“No contract for the sale of any goods, wares, or merchandise, for the price of fifty dollars or more, shall be good and valid, . . . unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.” Rem. Code, § 5290.

The real contract between the parties was an oral one, evidenced by the memorandum which we have set out. This memorandum was not signed by the respondent, and under the statute, according to the unquestioned holding of the authorities, the contract was unenforceable against the respondent. The appellant seizes upon this fact as a basis for arguing the lack of mutuality in the contract, and contends that, if it is unenforceable by the appellant, it must likewise be unenforceable by the respondent. While there is a conflict in the decisions of the courts upon this point, it is settled by the great weight of authority that a written memorandum of a sale of goods is sufficient as against the defendant in a suit, though it be signed by him alone. This seems to be rested on the theory that the statute is in the nature of a rule of evidence, neces-

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sitating written in place of parol proof. Under other provisions of the statute, the contract would be enforceable in the absence of any writing, if it had been partially performed by either party or anything done to bind the bargain. The term in the statute, "the party to be charged," is construed by the courts as being used with reference to the contracting party whom it is sought to hold liable in the courts, and as authorizing action by a purchaser who did not sign, against a seller who did sign the memorandum. *Knapp v. Beach*, 52 Ind. App. 573, 101 N. E. 37; *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576; *Morrison v. Browne*, 191 Mass. 65, 77 N. E. 527; *Bowers v. Whitney*, 88 Minn. 168, 92 N. W. 540; *Linton & Co. v. Williams*, 25 Ga. 391; *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352.

While this court has not heretofore had occasion to pass expressly upon the point in connection with the sale of goods, it has declared in the case of *Western Timber Co. v. Kalama River Lum. Co.*, 42 Wash. 620, 85 Pac. 338, 6 L. R. A. (N. S.) 397, 114 Am. St. 137, that a memorandum of sale of lands could be specifically enforced though not signed by the purchaser, the terms of sale signed by the seller being sufficient to take it out of the statute of frauds. To the same effect is *Tingley v. Bellingham Bay Boom Co.*, 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055, and *Anderson v. Wallace Lumber & Mfg. Co.*, 30 Wash. 147, 70 Pac. 247.

A further contention of the appellant is that there was no memorandum of sale signed by itself upon which it could be charged. It is true no actual written signature to the memorandum was made by the appellant or by its authorized agent, but the record shows that its authorized agent negotiated the sale with respondent, and entered the terms of the sale on a blank form used by appellant in dealing with custo-

mers, which contained at its top the name of the appellant as the acting party. We held in *Anderson v. Wallace Lumber & Mfg. Co.*, and *Tingley v. Bellingham Bay Boom Co.*, *supra*, that a contract may be signed within the meaning of the statute, no matter in what part thereof the name of the party to be charged may appear. Under these authorities, the use by the party to be charged of his written or stamped name to indicate his joinder in the contract set forth is a sufficient signature under the statute of frauds. See, also, *Dinuba Farmers' Union Packing Co. v. Anderson Grocery Co.*, 193 Mo. App. 236, 182 S. W. 1036; *Berryman v. Childs*, 98 Neb. 450, 153 N. W. 486, Ann. Cas. 1918 B 1029; *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343.

The appellant also contends that the bill of sale does not set forth all the terms of the bargain made, but that respondent was compelled to resort to parol evidence to establish them, and hence the memorandum was not sufficient under the statute. This court has lately had this question under consideration in the case of *Nut House v. Pacific Oil Mills*, 102 Wash. 114, 172 Pac. 841.

"The appellant claims that the orders taken—five in number—do not meet the requirements of this statute. While the orders are not formal contracts, the statute does not require that they should be. It is true that the orders, or some of them, are somewhat informal, but each of them contains the essential elements to satisfy the statute. The thing sold is described by words or abbreviations or by reference to sample. The price to be paid is mentioned and the terms of payment, also the party selling and the party purchasing, and each order is signed by the party to be charged. It is true that in one or more of the orders taken there were abbreviations the meaning of which it was necessary to explain upon the trial by oral testimony, but

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this was not proving an essential term of the contract not covered by the writing. No authority has been called to our attention which holds that, where it is necessary to explain an abbreviation by oral testimony, the contract necessarily fails to meet the requirements of the statute. We think the orders substantially complied with the requirements of the statute. The substantial effect of a holding that these orders were void would be to require that a contract to satisfy the statute should be a formal one. This would be not only a serious interference with the facility with which ordinary business transactions may be conducted, but would be extending the statute beyond its scope and meaning."

In the instant case, the writing showed the seller and purchaser, the quantity of goods sold, the price of the goods, and the date of the contract. It was shown by oral testimony that the "car" of flour comprised 310 barrels, packed in sacks of different capacities; that the smaller sacks were to be exchanged for larger; that delivery was to be made on the arrival of the car at Seattle from Minneapolis, at which time respondent was to pay for the flour; that the freight, amounting to about \$350, was to be paid by the appellant; and that the appellant was to receive, in addition to the price specified on the invoice, two per cent thereof. It is a matter for notice in this connection that the sum of \$2,790.46 is itself substantially the result of the addition of \$2,735.75, the miller's price of the car to the appellant, and \$55.71, the product of two per cent on that price. It is thus seen that the written memorandum of itself was sufficient to show a complete contract enforceable against the appellant, inasmuch as it set forth the purchaser and seller, the quantity and character of the goods, the price therefor, and the date of the contract. Time and place of delivery were not specified, but in such case a reasonable

time is to be presumed, and as both parties were engaged in business in Seattle, a like presumption would fix that point as the place of delivery. Parol evidence was admissible to explain the quantity understood by the parties to be comprised in a car-load. After proof of the amount of damages for nondelivery, the respondent might have rested, but he went farther. He tendered proof that the car of flour had been purchased in Minneapolis, had been shipped at the time of the contract, and was to be delivered in Seattle about April 25, 1917. He pleaded and proved that a car-load of flour consisted of 310 barrels. This seems to be based on the custom of the trade that a car-load usually contains that quantity, but there was no pleading as to such custom. He introduced in evidence the shipment invoice of this particular car, which showed a content of 297 barrels, made up of 284 sacks of 98 pounds, 600 sacks of 49 pounds, and 40 sacks of 24½ pounds. The car also contained an assortment of burlap and empty sacks of the value of \$143.90, and a quantity of advertising matter for the use of the appellant, which, of course, were not intended to be included in the purchase of the car-load. Out of excess of caution, the respondent proved that the freight was to be paid by the appellant, but the invoice discloses that the freight was deducted from the price at which the car-load was billed to the appellant. The respondent proved, also, that he was not to take the flour in the sizes in which it was packed for this shipment, but that the smaller sacks were to be exchanged for larger, not establishing, however, whether this agreement was meant to cover both the 600 sacks of 49 pounds and the 40 sacks of 24½ pounds, or only to apply to the smaller allotment.

We do not think that any of this evidence which was material was effective to alter or add to the contract

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shown by the written bill-head. It went no further than to show to what particular car the memorandum was addressed, to show the quantity comprised in that car-load lot, and to show that the car contracted for contained 297 instead of the customary 310 barrels. All the essentials of the sale of goods binding on the seller were contained in the writing, and the only tendency of the parol evidence was to explain what the term "1 car" of flour meant and that the price agreed upon was in full for that quantity. We find no prejudicial error in the admission of any of the oral testimony complained of.

The appellant complains of the action of the court in submitting to the jury the question of the amount of damages suffered by the respondent, and in this we think the court erred. The record shows that, on April 26, 1917, the date of the breach of the contract to deliver the flour, the brand in question was selling in Seattle at \$12.50 per barrel. The appellant had the exclusive agency for the Washburne-Crosby Gold Medal flour, and fixed the selling price within his territory. The president of the appellant corporation testified that, on that date, the price was \$12.50, and the record, in fact, shows that 100 barrels were tendered to the respondent at that price. There was no contradictory evidence of any other price prevailing at the time for Gold Medal flour. The only evidence addressed to selling price was that of experts to the effect that other flour of similar quality was selling at that time for \$14.70 per barrel. This could in no sense refute the evidence that the price of Gold Medal flour was a less sum. There was, it is true, evidence of a sale of this flour made by appellant at \$15 per barrel, but this was four months later and flour had been advancing in the meantime. Under the evidence, the

court should have withdrawn from the jury the question of finding the market value, and instructed them, if they found for the respondent, to assess his damages in a sum equal to the difference between the contract price of the flour and \$12.50 per barrel.

Respecting the authority of the salesman to bind appellant, we think there was sufficient evidence for the jury to find that he was acting for his principal. He had been a salesman for the appellant for some six years, actively engaged in soliciting orders, and had acted in that capacity on various occasions in making sales of goods to the respondent, employing in such sales the same kind of bill-heads as the one in controversy here. His authority in such sales had never been questioned by the appellant prior to this transaction.

The contention of the appellant, that it was denied the right of examining the respondent so as to show that he was not the real party in interest but was acting for certain corporations, is without merit. The contract was made with the respondent individually, and not in any representative capacity; hence he had a right to enforce it, his purpose as to disposition of the goods being immaterial to the appellant.

For the error noticed, there must be a reversal. However, a new trial is not required. The plaintiff was entitled to recover at a market price of \$12.50 per barrel. The judgment is reversed, and the cause remanded with instructions to enter a judgment on the basis indicated.

CHADWICK, C. J., MOUNT, MITCHELL, and PARKER, JJ., concur.

TOLMAN, J., dissents.

MACKINTOSH, J. (dissenting)—As I read the record in this case it discloses an effort on the part of appel-

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lant to fix his own measure of damages which are to be recovered against him for his breach of contract to deliver a carload of flour. When inquiry was made of him in regard to delivery, the appellant refused to deliver according to the terms of the contract, but notified the respondent that he could have some of the flour contracted for at the price of \$12.50 per barrel. The majority opinion fixes the measure of the respondent's recovery at the difference between the contract price and this \$12.50 per barrel. One who has breached his contract to deliver at a certain price cannot limit the recovery against him for such breach by offering, at the time of the breach, to deliver the identical goods contracted for at some other price higher than that stipulated in the contract but less than the market price. He cannot accomplish this even though the rule is enforced against the other party to the contract that he must do all in his power to minimize his damages. Under that rule he is not compelled to accept from the party who has breached his contract the very goods agreed to be delivered at an increased price. The majority opinion accomplishes this result, but seems to attempt to place it upon the ground that \$12.50 was the market price, the appellant being the only representative handling the brand of flour contracted for. The rule is in such cases: if there is in the market a commodity of the same quality as that contracted for, even though of another brand, that the measure of recovery will be the difference between the market price of the commodity contracted for, or commodities of similar quality, and the contract price. *Dean v. Van Nostrand*, 101 N. Y. 621, 4 N. E. 134. In other words, that it does not lie in the power of the contract violator, by reason of the fact that he is the only one in his community handling the brand of commodity

mentioned in the contract, to establish the market value of that commodity for the purpose of reducing his liability. The evidence discloses that flour of similar quality was worth \$14.70 per barrel in the market at the time the appellant offered to sell at \$12.50, which price he testified was the market price on that date. The court properly instructed the jury as to the measure of damages, and the verdict based upon those instructions should not be disturbed; in other words, no premium should be awarded to the appellant for having breached his contract.

I therefore dissent from the conclusion of the majority on this point.

HOLCOMB and MAIN, JJ., concur with MACKINTOSH, J.

[No. 14678. Department Two. January 21, 1919.]

BERTHA J. FITZPATRICK, *Appellant*, v. JOHN H.
FITZPATRICK, *Respondent*.¹

DIVORCE (80)—DIVISION OF PROPERTY—JURISDICTION OF SEPARATE PROPERTY. The jurisdiction in divorce to make a division of the property extends to separate as well as community property, and notwithstanding the parties had exchanged deeds prior to the actions.

SAME (80)—DIVISION OF PROPERTY. The matter of fault of the parties to a divorce does not require that one receive a larger proportion of the property than the other.

SAME (80). A wife granted a divorce may not be entitled to the larger portion of the property, in view of mutual fault, the fact that she was employed, and was given the home property and furnishings and relieved from the support of her child.

SAME (106)—SUPPORT OF CHILD. The division of property in substantially three equal portions for the husband, wife, and child is not inequitable; and the husband, being charged with making the child's portion produce certain sums, is properly given the

¹Reported in 177 Pac. 790.

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management of it, although the wife was awarded custody of the child.

SAME (63) — ATTORNEY'S FEES — DISCRETION. Rem. Code, § 988, rests the matter of allowances for attorney's fees and suit money in an action for divorce wholly in the discretion of the court, which will not be disturbed in the absence of abuse.

Appeal by plaintiff from a judgment of the superior court for Kitsap county, French, J., entered September 18, 1917, upon findings favorable to the plaintiff, in an action for divorce, tried to the court. Affirmed.

F. W. Moore, for appellant.

Robinson & Robinson and *J. W. Bryan*, for respondent.

FULLERTON, J.—The appellant brought an action for divorce against the respondent charging cruelty, drunkenness and failure to support. The respondent, by cross-complaint, asked for a decree of divorce on the ground of appellant's cruelty. The parties had a minor child, the award of whose custody was demanded by each of them. On the issues joined, the court made findings from which he concluded that the appellant was entitled to a divorce and to the custody of the child, and entered a decree accordingly.

With respect to the property of the parties, it made the following finding:

"That the property should be divided between the parties hereto and Elizabeth Fitzpatrick, the daughter aforesaid. That the nature of the property is such that it cannot be equally divided in kind without the party to whom certain parcels are decreed pay the other parties certain differences in value in cash."

The court, without making any findings as to the values of the respective parcels of real and personal estate belonging to the marital community, found what proportion thereof the plaintiff, defendant, and

their daughter were entitled to, and in its decree of divorce ordered as follows:

"It is further ordered that the plaintiff have as her separate property lots 17, 18 and 19 in block 1 of Dietz addition to the city of Bremerton, Kitsap county, Washington, household goods and furniture now located in the house on said premises except the piano; also the money deposited in the German American Bank, of Seattle, Wash., subject, however, to the payment of the \$366 to Elizabeth Fitzpatrick, the minor daughter aforesaid, and the further sum of \$266 to John H. Fitzpatrick, the defendant. Said sums to be paid within 30 days after the entry of this decree, or plaintiff to make, execute and deliver proper mortgages therefor on the property awarded her, said mortgages to bear 7% interest from date until paid, and to be lien on said property until paid either in cash or by mortgage.

"It is further ordered that Elizabeth Fitzpatrick, daughter of plaintiff and defendant, have as her property lots 1 and 2 in block 5 of Dietz addition to the city of Bremerton, Kitsap county, Washington, together with all furniture now in the cottages on said premises, and, also, the piano which has heretofore belonged to the parties hereto, and the further sum of \$366 in cash to be paid by plaintiff here to the said Elizabeth Fitzpatrick as hereinbefore mentioned.

"It is further ordered that the defendant John H. Fitzpatrick have as his sole and separate property the west 11 $\frac{3}{4}$ acres of lot 4 in section 10, township 24 north, of range 1, E. W. M., together with all tools and implements and furniture now on said premises, and the further sum of \$266 to be paid by the plaintiff herein as hereinbefore set forth.

"It is further ordered that the defendant pay to the plaintiff for the support of the minor child aforesaid a sufficient amount so that with the rents received from the property of the little child to wit, lots 1 and 2 aforesaid, she shall receive a total sum of \$25 per month, and the defendant, for the purpose of carrying out this term of the decree, is authorized to rent

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the premises, collect the rent and pay the plaintiff a lump sum of \$25 per month, in the event however the property ever brings more than \$25 per month, the whole sum shall be paid plaintiff for the support of the minor child. The first payment hereunder shall be made September 1st, and the first of each month thereafter, the defendant shall also pay all taxes and assessments on said property."

This appeal is from that portion of the decree which determines the division of the property.

Our code, relating to the division of property on granting a divorce (Rem. Code, § 989), reads as follows:

"In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage."

The interpretation put upon this statute in the early case of *Webster v. Webster*, 2 Wash. 417, 26 Pac. 864, has been uniformly followed in this court. In that case we said:

"This language is comprehensive; it is an equitable division of the property rights of the parties that the court is authorized to make. . . . the parties shall bring into court all their property, and a complete showing must be made. Each party must lay down before the chancellor all that he or she has, and, after an examination into the whole case, he makes an equitable division. . . . The law does not require an equal division of the property, but a 'just and equitable' division, and as no general rule for a just and equitable division can be laid down, but each case

must be adjusted according to its own merits and the particular circumstances surrounding it, the court investigates all the circumstances."

See, also, *Hale v. Hale*, 76 Wash. 34, 135 Pac. 481.

The record in the present case shows that the husband, before his marriage, was the owner of lots 17, 18 and 19, in block 1, Dietz addition to Bremerton, and that, during marriage, the community acquired lots 1 and 2, block 5, in the same addition, and $11\frac{3}{4}$ acres of rural property. Prior to the divorce proceedings, the appellant and the respondent exchanged deeds, whereby the town property was conveyed to the wife and the rural property to the husband. The appellant contends that it was error for the court to place the lots standing in her name into the common fund for division. But jurisdiction over the property for division was vested in, and rightly assumed by, the court, and the circumstance that it had been conveyed by the husband to the wife did not deprive the court of such jurisdiction. As was held in the cases cited, the jurisdiction to make an equitable distribution extends to separate as well as community property.

The contention is made by the appellant that, inasmuch as the granting of the divorce to her showed that the respondent was in the wrong, she was entitled to the larger proportion of the property, and that she was awarded, at best, but an equal proportion. But aside from the fact that the record indicates that the court did not find her entirely free from fault, the circumstance itself is not controlling. As we say, the code requires an equitable division of the property. While the circumstance of fault is a proper matter to be inquired into in making the division, it is only a persuasive matter; it does not require that a larger proportion of the property be given to the party not in fault than is given to the other.

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A further contention is made that the appellant should have been allowed a larger proportion of the property because the respondent was employed at wages bringing him about \$125 per month, while she would be compelled to go out and earn a living. She was, however, earning her living at the time of her marriage, had employment at the time of her divorce, and was in nowise incapacitated from work. She brought into the community \$280 in funds, \$100 of which stood to her credit in bank at the time of the separation and was awarded to her, as well as the home property with its household furnishings. In the light of the record in the case, showing mutual fault of the spouses, that the appellant was employed and capable of earning her own living, that she had been given the home property with its furnishings, and that she was partially, if not wholly, released of any necessity for the support of the child, we cannot say that she was entitled to a larger share of the property by reason of the greater earning capacity of her husband.

The principal complaint of the appellant is that the court, in awarding her certain property, incumbered it with liens amounting to \$532, which she claims it will be difficult for her to meet without sacrificing the property, and that a more equitable decree would have been to award her the property granted by the decree to her minor child. The record shows that the court undertook to divide all the marital property between the spouses and their minor child in substantially the proportions of one-third each. There were three parcels of realty, whose approximate values the evidence tended to show as follows: Eleven acres of land with working tools and furniture, \$1,500; the home property on three town lots with household furniture, \$2,800; and two other town lots with shacks on them, with fur-

nishings worth about \$75, worth in all about \$1,500. The court awarded the appellant the home place and furniture, and burdened her with a charge of \$366 in favor of the child and \$266 in favor of the respondent. This would make the property awarded appellant of the value of approximately \$2,168. The child was given property of the value of \$1,500, a money allowance of \$366 and a piano, \$200, making her portion approximately \$2,066. The husband was given the acreage and a money allowance of \$266, making his proportion \$1,766. These figures we deduce from the record, and they do not show, in our opinion, any abuse of the court's discretion.

The buildings upon the property awarded the child brought in a small rental, and the respondent was ordered to manage the property in the interest of the child, collect the rents and pay the rental over to the appellant for the support of the child, and in case the rental for any month fell below the sum of \$25, to make good the deficiency. The appellant complains that, inasmuch as the custody of the child was awarded to her, she should also have been awarded the management of the property, and that the respondent should have been required to supply the necessary support for the child from his personal earnings. But, from the record, we are satisfied with the disposition of the child's property as made by the court. It is not shown that the respondent is not competent to manage the property, and since he must make the rentals produce a given sum, it is but just that he should have its management.

Another contention of the appellant is that the court erred in allowing her but \$75 for her attorney fees, together with her statutory costs and witness fees, and in denying her any further allowance of suit money and attorney fees on appeal. The statute pro-

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viding for the allowance of such items (Rem. Code, § 988), rests the matter wholly in the discretion of the court, and from the record herein, we cannot say that any abuse of such discretion is shown. *Griffith v. Griffith*, 74 Wash. 284, 133 Pac. 443.

The judgment is affirmed.

MAIN, HOLCOMB, PARKER, and MOUNT, JJ., concur.

[No. 14847. Department Two. January 21, 1919.]

HERMAN A. KRAMER *et al.*, *Appellants*, v. CARBOLINEUM
WOOD PRESERVING COMPANY, *Respondent*.¹

NEGLIGENCE—SALE OF INJURIOUS REMEDIES—LIABILITY OF STATE AGENT. An agent handling the sale in certain states, but in no way connected with the manufacture, of a secret process remedy, misrepresented to make fruit trees healthier, is not liable for damages caused by use of the remedy purchased from another agent; since there can be no liability in the absence of privity, where the thing sold was not of a noxious or dangerous kind and the defendant did not make the sale and was guilty of no fraud, deceit or negligence with reference to the sale or manufacture.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered November 12, 1917, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for damages. Affirmed.

Henry Crass and *R. Sleight*, for appellants.

C. A. Sheppard and *McMaster, Hall & Drowley*, for respondent.

MOUNT, J.—This action was brought to recover damages for the loss of a number of trees in a prune orchard. The complaint alleged that the damages were

¹Reported in 177 Pac. 771.

caused by the defendant preparing and putting up under a secret process in sealed tin cans a preparation called Avenarius Carbolineum, which was sold by the defendant under a representation printed upon the label on the cans stating that:

“Trunks of fruit trees painted with Avenarius Carbolineum will not be troubled with borers and will become healthier.”

The complaint alleged that, with knowledge of this representation and in reliance upon it, the plaintiff purchased this substance and applied it to the prune trees in the orchard, and that the application of this Avenarius Carbolineum was for the purpose of destroying and exterminating borers, some of which had begun to appear in plaintiff's orchard, and for the purpose of rendering said trees healthier; but that, instead of so doing, the application caused a large number of the trees to die, and injured a large proportion of the remaining trees so as to render them worthless and make it necessary for the plaintiff to dig them up and set out new trees in their place; that the trees thus injured and destroyed were of seven years' growth, and that the plaintiff had lost the time required to replace them with other trees of equal growth, and had been damaged by the destruction and injury to the trees in the sum of \$15,000. The answer admitted the incorporation of the defendant, and admitted that borers were harmful to fruit trees and, if not exterminated, would kill the same, and denied the other allegations of the complaint. Upon these issues, the case was tried to the court and a jury. At the close of all the evidence, the court, upon the defendant's motion, directed a verdict in favor of the defendant and thereafter dismissed the action. The plaintiff has appealed.

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Upon the trial of the case, the evidence showed that the respondent was not the manufacturer of the product known as Avenarius Carbolineum; that this product was originally manufactured in Germany under a secret process and afterwards manufactured in Milwaukee, Wisconsin, by a Wisconsin corporation; that the respondent was not connected in any way with the manufacturing company, except that it handled the product in the states of Washington and Oregon; and that the ingredients from which Avenarius Carbolineum was manufactured were unknown to the respondent. It was also shown that the product used by the appellant was not purchased from the respondent, but was purchased from the Portland Seed Company, a company in Portland, Oregon, which also had the product on sale. It was also shown that the appellant purchased twelve gallons of Avenarius Carbolineum from the Portland Seed Company, but this Avenarius Carbolineum was contained in cans upon which there was no advertisement whatever; that, prior to the purchase of these twelve gallons from the Portland Seed Company, the appellant had purchased a one-gallon can from some firm in Vancouver, Washington, during the fall of 1915, and upon this one-gallon can was a statement to the effect that:

“Trunks of fruit trees painted with Avenarius Carbolineum will not be troubled with borers and will become healthier.”

Before purchasing the twelve gallons, the appellant wrote a letter to the Portland Seed Company inquiring if Avenarius Carbolineum would kill borers and make fruit trees healthier, and thereupon purchased from the Portland Seed Company the Avenarius Carbolineum which was afterwards put upon the trees. There was evidence to the effect that the trees after-

wards died. There was also evidence which tended to show that this preparation would kill borers and other insects that infect fruit trees, and that it had, in a number of cases, been beneficial when used upon trees.

If we may assume that there was sufficient evidence to go to the jury that the preparation which was purchased by appellant and used upon the prune orchard destroyed the trees, it is plain that this respondent was not liable therefor. It was not shown that the Avenarius Carbolineum which was purchased by the appellant was sold by the respondent or was ever in its possession. It is not claimed by the appellant that it was purchased from the respondent, and it is conclusively shown that respondent was not the manufacturer and had no connection with the manufacturers, and did not know the ingredients. Respondent was simply an agent for the sale of the preparation, and so far as the record shows, the Portland Seed Company, from whom the appellant purchased, was likewise an agent. The appellant relies upon the case of *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, Ann. Cas. 1915C 140, 48 L. R. A. (N. S.) 213. In that case we said:

“It has been accepted as a general rule that a manufacturer is not liable to any person other than his immediate vendee; that the action is necessarily one upon an implied or express warranty, and that without privity of contract no suit can be maintained; that each purchaser must resort to his immediate vendor. To this rule, certain exceptions have been recognized: (1) Where the thing causing the injury is of a noxious or dangerous kind; (2) where the defendant has been guilty of fraud or deceit in passing off the article; (3) where the defendant has been negligent in some respect with reference to the sale or construction of a thing not imminently dangerous.”

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It is at once apparent that the *Mazetti* case does not sustain a recovery in this case, for this case does not fall within any one of the exceptions named there. The Avenarius Carbolineum is not shown to be of a noxious or dangerous kind. It was not shown that the respondent had been guilty of fraud or deceit in passing off the article, or that the respondent had sold, or ever had possession of, the article purchased by the appellant; and it was not shown that the respondent had been negligent in any respect with reference to the sale of the article purchased by the appellant and used upon his fruit trees. Not coming within any of these exceptions, the general rule must apply, that, where there is no privity of contract between the appellant and the respondent with reference to the sale of the Avenarius Carbolineum, no liability exists against the respondent.

We are satisfied, therefore, that the trial court properly directed a verdict in favor of the respondent.

The judgment must be affirmed.

MAIN, PARKER, FULLERTON, and HOLCOMB, JJ., concur.

[No. 14864. Department Two. January 21, 1919.]

MATT HENDRICKSON, *Respondent*, v. FRITZ SUND,
Appellant.¹

EASEMENTS—OBSTRUCTIONS—ACTIONS—INCONSISTENT CAUSES. In an action to establish and restrain the obstruction of a private way, an allegation showing plaintiff entitled to a right of way of necessity is not inconsistent with his claim of a right of way by prescription, and it was not error to refuse to require the plaintiff to elect between his two causes of action, where all the facts alleged showed he was relying on his prescriptive right and he did not seek to condemn a right of way of necessity.

APPEAL (457) — REVIEW — HARMLESS ERROR — EXCLUSION OF EVIDENCE. In an action to restrain the obstruction of a private way by prescription, the exclusion of a complaint in a former action by defendant showing he originally claimed a public way is not reversible error, where there was no dispute in the evidence as to that question.

EASEMENTS (5-7)—PRESCRIPTIVE RIGHT — EXCLUSIVE AND ADVERSE USE. Where the owner of land acquiesced in the construction of a road across it for the indefinite use of a neighbor, who used it for the necessary period, he acquired a prescriptive right, notwithstanding his use was not exclusive and the road was used by the owner and others; and his hostile or adverse use is sufficiently shown where such use was continuous for a period of thirty years during which time money was expended in repairs and building bridges with no objection by the owner.

Appeal from a judgment of the superior court for Wahkiakum county, Hewen, J., entered November 7, 1917, upon findings in favor of the plaintiff, in an action for an injunction and for damages, tried to the court. Affirmed.

Norblad & Hesse, for appellant.

Enoch E. Mathison and *J. J. Barrett*, for respondent.

¹Reported in 177 Pac. 808.

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Opinion Per MOUNT, J.

MOUNT, J.—This action was brought to restrain the defendant from obstructing an alleged private way, and for damages for such obstruction, and to have the way declared a private way by prescription. The defendant filed a general denial to all the allegations of the complaint. The case was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff. The defendant has appealed.

A number of errors are assigned. The facts will be stated more fully in considering these alleged errors.

The appellant argues, first, that the court erred in not requiring the respondent to elect upon two alleged inconsistent causes of action. It is conceded that the complaint states a cause of action based upon prescriptive right or adverse possession of a road. The complaint, in paragraph 5, alleges:

“That, by reason of the obstruction of said private roadway by the defendant, as aforesaid, the plaintiff’s said property is landlocked and he has no practicable means or way of travel by vehicles or otherwise to the United States postoffice, market, church, or elsewhere, and that since such obstruction of said private roadway, the plaintiff has actually been thereby forced to pack and carry on his back, to his said residence, the necessities of life for himself and family, . . .”

The appellant contends that the complaint first states a cause of action for the use of a way by prescriptive right, and in this paragraph states an inconsistent cause of action to acquire a private way of necessity; that these two causes of action require inconsistent proof; and therefore the court erred in not requiring the respondent to elect. Without determining whether two causes of action are, as a matter of law, stated in the complaint, we think it is sufficient to say that this allegation is not inconsistent with the allegation that the respondent is entitled to a right of

way by prescription over the land of the appellant. The facts, as shown by the complaint, are, that the respondent owns a tract of land to the east of a tract owned by the appellant; that, for more than thirty years, respondent has traveled over a private way across the land of the appellant without objection; that the appellant has owned his tract of land for a period of about two years; that the predecessors in interest of the appellant had joined with the respondent in building the road in question; that they had purchased a right of way across another piece of land for the purpose of building this road; that it was used by the respondent and the predecessors of the appellant for a long period of years; that bridges were built across some streams; and that, prior to the bringing of this action, the road was obstructed by the appellant and the respondent was forbidden to travel thereon; the bridges were torn out by the appellant; and that the respondent had no other means of access to his property. It is apparent from all the allegations of the complaint that the respondent relied upon his prescriptive right to travel the road, and not upon the fact that it was a way of necessity. While, under the facts alleged, he might have condemned a way as a private way of necessity, he was not attempting to do so in this action, but was relying upon his right acquired by prescription. We are satisfied, therefore, that the trial court did not commit error in refusing to require the respondent to elect between two alleged causes of action.

Appellant next argues that the court erred in refusing to receive in evidence a complaint which had been filed in a former action by the respondent against the appellant, in which complaint it was alleged that the roadway in question was a public way. The evi-

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dence shows that the respondent originally claimed that the way was a public way because he and his neighbors, and all other persons who desired to use the road, had used it. There is no dispute upon this question, and it was not reversible error, therefore, for the trial court to refuse to receive the complaint in the other action in evidence in this.

Appellant next contends that the court erred in refusing to dismiss the action at the close of the respondent's evidence, for the reason that the evidence showed that the use of the road was not an exclusive use by the respondent and not adverse, but was a permissive use which the respondent had enjoyed for more than thirty years. The evidence showed that, when the road was first constructed over the land owned by the appellant, the land was then owned by a man named Maline, who, with respondent, constructed the road, built bridges, repaired the road and used it in common. Mr. Maline testified in this case. He testified that there was no express consent given, and that there was nothing said upon that subject. When asked whether he gave permission to construct the road or to travel thereon, he answered:

"No, I didn't give any permission— Didn't say nothing. Q. He had your consent? A. He never asked me."

So it is apparent that, when the road was originally constructed and used, no objection was made thereto by the owner of the land. He acquiesced in what was done. It is true that he and his successors in interest also used the road, and it is true that other parties desiring to go to the home of the respondent also used the road. As is said in 9 R. C. L., p. 773, § 33, referring to user:

"It is sometimes declared that it must also be exclusive, but the term 'exclusive use' does not mean

that no one may use the way except the claimant of the easement. It means no more than that his right to do so does not depend on a like right in others.”

We are of the opinion that the evidence does not disclose that the right to use the road was a mere license or a temporary permissive right. It shows that the right was given, as a matter of course, for an indefinite use by the respondent, and, therefore, when he had used the road for the required length of time, he acquired a prescriptive right, notwithstanding the fact that the owner of the servient estate and others who desired to go upon the road also used it. We are of the opinion, therefore, that the court did not err in refusing to dismiss the action.

Appellant next argues that there was no hostile, notorious, continuous, adverse user under a claim of right for a sufficient length of time to ripen into a prescriptive right in the respondent. We think the evidence is clear upon these questions. As we have already said, the evidence shows conclusively that the respondent and the predecessor of the appellant constructed the road for their own use and for others who might desire to use it. This use was continued uninterruptedly by respondent for a period of more than thirty years. Thereafter, this appellant acquired the servient estate and undertook to, and did, obstruct the road, tear up the bridges, and refused respondent permission to travel thereon. If a right of way can be acquired by prescription, we think it plain that the respondent acquired such right in this case. In the case of *Wasmund v. Harm*, 36 Wash. 170, 78 Pac. 777, we held that an easement of a right of way across the land of another, in favor of an adjoining owner, may be acquired by adverse user for the period of limitations for quieting title to lands—which is ten years.

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In *Van de Vanter v. Flaherty*, 37 Wash. 218, 79 Pac. 794, we held to the same effect, saying:

“The witness Wilcoxon occupied the land now owned by the plaintiff from 1884 to 1898, and during all that period he used the roadway in question, and expended \$100 in building the roadway, and keeping the same in repair. This witness, and his successors in interest, used the roadway continually for nearly twenty years, without let or hindrance from any person, and, during all said time, expended more or less money in keeping the road in repair and fit for public travel. We think the testimony ample to establish a roadway by prescription, under the decisions of this court”

The same is true in this case. The respondent here had used the road continuously for a period of more than thirty years. He had expended labor and money upon it in building bridges and in repairing it, and no objection was made thereto by the owner until the appellant acquired the tract, when he then obstructed the road, tore up the bridges, and refused the respondent the right to travel the same.

We are satisfied, under all the facts of the case, that the respondent here acquired a right by prescription to the use of this road.

The judgment appealed from is therefore affirmed.

HOLCOMB, PARKER, FULLERTON, and MAIN, JJ., concur.

[No. 14899. Department One. January 21, 1919.]

H. K. OWENS *et al.*, Appellants, v. FREDERICK BAUSMAN
et al., Respondents.¹

MORTGAGES (243)—FORECLOSURE—ATTORNEY'S FEES—STIPULATION IN NOTE. A mortgage note containing a promise to pay a reasonable attorney's fee, in case suit is instituted to collect the note, entitled attorneys in a foreclosure action to a reasonable fee upon a settlement and discontinuance of the foreclosure.

BILLS AND NOTES (7)—CONSIDERATION. The amount which attorneys in a foreclosure action were entitled to as a reasonable fee under the terms of the mortgage note, agreed to upon settlement of such action, is a good and valuable consideration for a note therefor by the mortgagors to the attorneys.

APPEAL (462)—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Error in instructions to the jury is harmless where the verdict was merely advisory.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 14, 1917, in favor of the defendants, in an action to recover a promissory note on the ground of duress and failure of consideration, tried to the court and a jury. Affirmed.

Vince H. Faben, for appellants.

Walter L. Nossaman, for respondents.

MAIN, J.—The purpose of this action was to obtain possession of a promissory note, claimed to have been given under duress and without a valuable consideration. To the complaint the defendants presented an answer and cross-complaint. In the answer, the allegations of the complaint were denied. In the cross-complaint, foreclosure was sought of a mortgage which had been given to secure the note in question. By consent of counsel, the cause was tried as an equity

¹Reported in 177 Pac. 792.

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action, and the verdict of the jury was taken upon the issues made by the complaint and the answer. The verdict of the jury was against the claims made by the plaintiffs. Judgment was entered dismissing the plaintiffs' action and allowing a recovery against them upon the cross-complaint. In other words, the issues made between the original complaint and the answer and the issues upon the cross-complaint were all found in favor of the defendants to the original complaint (the plaintiffs in the cross-complaint). From this judgment, the appeal is prosecuted.

The controversy arose out of facts which may be briefly summarized. On June 24, 1911, the appellants, H. K. Owens and wife, being then the owners of valuable real estate in the city of Seattle, mortgaged it to the Metropolitan Life Insurance Company, a corporation, to secure the payment of a promissory note in the sum of \$30,000. This note and mortgage became due five years after date, or on June 24, 1916. The respondent law firm was the representative of the Metropolitan Life Insurance Company in Seattle. During the latter part of the year 1916, Mr. Oldham, of this firm, upon investigation, found that the taxes upon the property covered by the mortgage were delinquent in the sum of approximately \$2,000. He thereupon called Mr. Owens' attention to this fact, and thereafter numerous conversations took place between them relative to the payment of the taxes and interest due and the obtaining of an extension of the note and mortgage, Mr. Oldham writing from time to time to the Metropolitan Life Insurance Company to ascertain what it desired in the matter. The negotiations and correspondence continued until the latter part of February, when the respondents were directed by their principal to begin the foreclosure action. Much of the discussion between the parties was over the question

as to whether Owens would assign to the Metropolitan Life Insurance Company the rents that might be due from time to time from the building upon the property covered by the mortgage. No conclusion was reached as to this matter, and on the 27th of February, 1917, an action was begun to foreclose the \$30,000 mortgage, respondents appearing as attorneys for plaintiff in that action. About two months subsequent to the time the action was instituted, the matters between the Metropolitan Life Insurance Company and the appellants were adjusted by an extension of the note and mortgage and the dismissal of the foreclosure action, all negotiations between the parties having been conducted by Mr. Oldham and Mr. Owens. At the time the foreclosure action was dismissed, the respondents claimed that they had earned in that action, as attorney's fee, the sum of \$500. Mr. Owens, not having the available cash, gave a note for this sum, secured by a mortgage upon real estate other than that covered by the Metropolitan Life Insurance Company mortgage. A few weeks subsequent to this, the appellants brought this action to recover possession of the note. When the cause came on for trial, the question arose as to whether it should be tried as an equity or law action. After some colloquy between court and counsel, it was agreed that it should be tried as an equity action and that the verdict of the jury, therefore, would be merely advisory. At the conclusion of the evidence, the court submitted to the jury two special interrogatories which covered the issues made by the original complaint and the answer. By the first interrogatory the jury were directed to find whether there was any consideration for the note. This interrogatory was answered "Yes." By the second interrogatory the jury were directed to answer whether the note

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was obtained by duress, coercion or threats. This was answered "No."

It is unnecessary here to discuss or determine the question whether the action was one triable at law or in equity, since, by consent of counsel, it was tried as an equity action and the verdict of the jury was taken in an advisory capacity.

As to the second question propounded to the jury—that relating to duress, etc.—it may be said there is no evidence in the record that would sustain any other finding than that made by the jury. The giving of the note was entirely voluntary, and it was taken, as above indicated, because of the inability of the appellants at that time to pay cash.

Whether the jury's finding upon the first interrogatory—that relating to the consideration for the note—should be sustained depends upon whether an attorney's fee had been earned in the action brought by the Metropolitan Life Insurance Company to foreclose the \$30,000 mortgage, in which action the respondents were the attorneys for the plaintiff. The note, which that mortgage was given to secure, among other things, provided that, in case "suit is instituted to collect this note, or any portion thereof, I promise to pay such additional sum as the court may adjudge reasonable, as attorney's fee in such suit." It will be noted that here was a promise to pay a reasonable attorney's fee in the event that a suit was "instituted" to collect the note. When the foreclosure action was dismissed, under the terms of the note, the respondents were entitled to a reasonable attorney's fee to compensate them for the work which they had done up to that time. The parties agreed upon the sum of \$500, and it was for this sum that the note here in question was given. There can be no question that the amount

which the respondents were entitled to as attorney's fee in the foreclosure action was a good and valuable consideration for the note here in controversy.

It is claimed that the trial court erred in instructions to the jury. It may be said in passing that the instruction complained of correctly stated the law; and, if it did not, it would not be reversible error, because the case is tried here *de novo*.

The judgment will be affirmed.

CHADWICK, C. J., MITCHELL, PARKER, and TOLMAN, JJ., concur.

[No. 14955. Department Two. January 22, 1919.]

BLANKENSHIP BROTHERS, *Appellants*, v. ORA KNOX
et al., *Respondents*.¹

PAYMENT (12, 29)—APPLICATION—EVIDENCE. Findings that a debtor, interested in part of the proceeds of the sale of sheep, directed application of her part to the payment of her separate indebtedness are sustained, where her testimony was supported by that of another witness and by surrounding circumstances, and her adversaries' testimony was unsupported.

HUSBAND AND WIFE (16, 23, 29)—PRESUMPTIONS—WIFE'S SEPARATE PROPERTY AND DEBT. Where a contract for the purchase of lambs was made while the vendee was unmarried, and consummated after her marriage, there is no presumption that the lambs became community property, even though her husband joined with her in executing a mortgage on her separate property to secure payment, as the obligation was her separate debt.

HUSBAND AND WIFE (24)—SEPARATE ESTATE—AUTHORITY OF HUSBAND. Upon the sale of the separate property of the wife, she has the right to direct application of the proceeds, and any contract by her husband to the contrary would not be binding upon her.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered November 5, 1917,

¹Reported in 178 Pac. 629.

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in favor of the defendants, in an action to foreclose a mortgage, tried to the court. Affirmed.

John C. Applewhite and E. J. Doyle (Fred E. Butler, of counsel), for appellants.

C. H. Baldwin, for respondents.

FULLERTON, J.—The appellants brought this action against the respondent Ora Knox and others to foreclose a mortgage upon real property. One of the defenses was payment, and on this issue the trial court found in favor of the respondents, canceling and setting aside the mortgage.

The evidence discloses that, prior to and at the time of the execution of the mortgage sought to be foreclosed, one John Knox held certain sheep belonging to the appellants which he was running on shares, that is, for one-half of the wool and one-half of the increase from the sheep. The increase of the flock for 1911 had not been divided and amounted to some 1,176 lambs. In November of that year, Mrs. Knox, then Mrs. Eaton, contemplating marriage with John Knox, contracted with the appellants to purchase their interest in the lambs. On the same day she married Knox, and on the next day executed the mortgage in question upon real estate owned in her separate right to secure a part of the purchase price, her then husband joining with her in the execution of the mortgage. Knox then owed the appellants some \$2,300, and a chattel mortgage was given upon Knox's interest and accruing interests in the sheep, together with the lambs purchased by the respondent, to secure the indebtedness, Mrs. Knox joining in the mortgage. Knox continued to run the sheep until June 1, 1918, at which time the business relations of the parties

were discontinued. The appellants had in the meantime advanced to Knox to meet the expense of feeding and caring for the sheep, the shearing expenses and the like, an additional sum approximating \$2,200. At this time the interests of the respondent and her husband in the sheep were sold, their combined interests bringing \$4,523, the purchase price of the property being paid to the appellants. Of this sum Knox's interest amounted to \$2,738.50, and the respondent's to \$1,784.50.

At the trial, the respondent testified that, when the transaction had been completed, the appellant D. E. Blankenship, who had the matter in charge, approached her and asked what she wished to have done with her interest in the money; that she told him she wished to have the debt secured by mortgage upon her real property paid and the mortgage canceled, and that, when this was done, he might apply the balance as he pleased; that he told her he did not have the papers with him, but would procure them and later send them to her, and would cancel the mortgage of record. In this she is corroborated by an employee, who happened to be within hearing when the conversation was had. Her testimony, however, is flatly contradicted by D. E. Blankenship. He testified that he was directed, both by the respondent and her husband, to apply the money first to the satisfaction of the chattel mortgage, and then to the satisfaction of the advancements; that he did so apply it, and after so doing, there was left, not only the debt secured by the mortgage upon the real property, but some \$200 due of the money advanced for the care of the sheep. Each of the parties introduced circumstances thought to support their view of the transaction, but these lend little aid in the solution of the issue involved. In so

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far as they are material, the evidence concerning them is contradictory.

With the record in this condition, we cannot do otherwise than follow the conclusion of the trial court. The burden to establish the payment, it is true, was upon the respondent, but, upon the face of the record, she has successfully met the burden. She has a supporting witness, which the appellant has not.

It is true, also, that the trial court did not find that either party had wilfully sworn falsely. In his memorandum opinion, filed in the record, he concluded that the parties testified to the facts as they remembered them, and resorted to the surrounding circumstances to ascertain wherein the truth lay. In so doing, he concluded that, since the obligation represented by the mortgage was the separate debt of the respondent, and since she owned of the consideration paid for the sheep and wool, as her separate property, more than sufficed to satisfy the debt and the proportionate share of the advancements made for the care of the sheep with which she could justly be charged, she would naturally desire and direct that her separate funds in the hands of the appellants be applied to her separate debt. But in this there is no error. The line of reasoning may not be conclusive, but the court had the right to resort to it as an aid in determining the weight of the evidence.

The appellants contend that the lambs purchased by the respondent became the community property of herself and Knox, and the debt incurred therefor a community debt, and that, since the husband has the control of the community property and business, the court erred in refusing their offer of evidence tending to show a settlement of the transaction with the husband in which he directed the application of the pay-

ments, and that they were applied as he directed. But we cannot agree that the property purchased by the respondent became the community property of herself and her husband. It is the rule, no doubt, that when a wife, during coverture, contracts for and purchases property, incurring an obligation by the transaction, the property purchased is presumptively community property, and the debt incurred presumptively a community obligation, but here, it will be remembered, the contract for the purchase of the lambs was made while the respondent was unmarried and capable of making such a contract in her own right, and that the contract was consummated only after her marriage. In such a case, no presumption of community interests arises. The contract having been entered into while the respondent was capable of contracting, could have been enforced against her notwithstanding her subsequent marriage, and against the will of her husband. In such a case, the property would manifestly have been her separate property, and the obligation incurred her separate obligation. The nature of the obligation and the title to the property is not changed because she voluntarily completed the transaction after her marriage, even though her husband joined with her in the obligation incurred. In order to change the nature of the title acquired and the nature of the obligation incurred, a new contract between the appellants and the husband and wife would have to be presumed, and no such presumption arises out of the facts shown. The property being the separate property of the respondent, the receipts from its sale were likewise her separate property. Of this she alone had the right to direct application, and any contract with her husband to the contrary would not be binding upon her, unless, of course, she consented that her

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husband might make the application, and there was no offer to show that she did so. There was no error, therefore, in excluding the testimony, although the court may have based the reason for his refusal upon another principle of law.

We find no reason for reversing the judgment, and the order will be that it stand affirmed.

MAIN, PARKER, HOLCOMB, and MOUNT, JJ., concur.

[No. 15060. Department One. January 22, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
WILLIAM VANE, *Appellant*.¹

CRIMINAL LAW—CONTINUANCE—CONVICTION OF PERJURY—EFFECT. The continuance of a criminal case against one convicted of perjury until he had obtained a reversal thereof is properly denied; since Rem. Code, § 1212, providing that any person convicted of perjury shall not be a competent witness unless the judgment is reversed, does not deny the right under Const., art. 1, § 22, to testify in one's own behalf.

LARCENY (6)—INFORMATION—SUFFICIENCY. An information sufficiently charges the offense of horse stealing by one assisting therein, where the offense is charged in the language of the applicable portion of Rem. Code, § 2601, defining larceny, and of §§ 2007, 2260, providing that no distinction shall exist between principal and accessories, who may be proceeded against as principals, and where it enables a person of common understanding to know what is intended.

CRIMINAL LAW (161)—EVIDENCE—TESTIMONY OF ACCOMPLICES. In a prosecution for larceny, evidence is competent against an accessory that the principal, who admitted his guilt, drove the team to H. and there sold them, when such evidence would have been competent against the principal.

SAME (27)—JURISDICTION—LOCALITY OF OFFENSE—ACCESSORY IN ANOTHER STATE. Under Rem. Code, § 2254, subdiv. 3, providing for the punishment of one who, being out of the state, counsels, procures or abets another to commit a crime in this state, evidence

¹Reported in 177 Pac. 728.

is admissible of a conversation had with accused in another state, after full agreement and plans for the theft had been made in this state.

CRIMINAL LAW (101)—EVIDENCE—RES GESTAE—SUBSEQUENT CONDUCT. Upon a prosecution for larceny by an accessory, evidence that defendant had aided the principal in his defense of alibi on prosecution for the same larceny is admissible as part of the *res gestae*.

LARCENY (12)—VARIANCE. A fatal variance in charging the theft of horses belonging to C. Brothers is not shown by evidence of one of the firm who answered "I was," to the question whether he was the owner, where he afterwards used the plural "we," and ownership of the firm was testified to by another witness.

CRIMINAL LAW (301)—INSTRUCTIONS—FORM AND LANGUAGE. Under an information charging the fact of aiding, assisting, etc., in a larceny, employing the words in the conjunctive, it is not error for the instructions to mention them in the disjunctive.

SAME (17, 19)—ACCOMPLICES. As an accessory is tried as a principal, he cannot object to instructions concerning accomplices because he did not do the actual stealing.

SAME (316)—INSTRUCTIONS. It is not error to refuse requested instructions that are covered in the general charge.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered April 3, 1918, upon a trial and conviction of larceny. Affirmed.

R. L. Edmiston and *E. L. Sheldon*, for appellant.

Chas. H. Leavy, for respondent.

MITCHELL, J.—Appellant, by a jury, was found guilty of the crime of grand larceny, on account of stealing a team of mares of the alleged value of \$450, the property of Cunningham Brothers. From the judgment and sentence thereon, this appeal has been prosecuted.

It appears that one Carl Brink stole the horses, having been aided and abetted therein by the appellant, who was proceeded against as a principal under the provisions of Rem. Code, §§ 2007 and 2260. In the trial of Carl Brink for the larceny in Pend Oreille

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county, appellant acted as a witness in support of the defense of an alibi. Later in that trial Carl Brink made a confession, was adjudged guilty, and sentenced to the penitentiary. Growing out of appellant's testimony in the Brink trial, he was charged, convicted and adjudged guilty of perjury and sentenced to the penitentiary, from which judgment and sentence he appealed. His appeal in that case was still pending when the present case was tried in Spokane county, to which it was transferred from Pend Oreille county upon appellant's application.

Prior to trial, appellant moved for a continuance "until such time as defendant shall have obtained a reversal of the judgment and sentence in the perjury case or until he had received a pardon." The motion was supported by affidavit and certified copies of the proceedings in the perjury case. In presenting the motion he relied on Rem. Code, § 1212, which provides:

"That any person who shall have been convicted of the crime of perjury shall not be a competent witness in any case, unless such conviction shall have been reversed, or unless he shall have received a pardon."

The trial court, in properly denying the motion, advised appellant that the provisions of § 1212 of the code would not be respected to the extent of denying him his right to testify in his own behalf, as guaranteed by art. 1, § 22, of the state constitution. Appellant did testify in his own behalf.

A demurrer to the information, interposed prior to trial, and an objection at the time of trial to the introduction of any testimony because the information failed to state facts sufficient to constitute a crime, were properly overruled. An examination of the information shows it to have been drawn in the language

of the applicable portion of Rem. Code, § 2601, defining larceny, and of §§ 2007, 2260, providing no distinction shall exist between an accessory before the fact and a principal, and providing that such accessory shall be indicted, proceeded against and punished as a principal. Informations in similar cases and in substantially the same language are found in the cases of *State v. Klein*, 94 Wash. 212, 162 Pac. 52, and *State v. Mann*, 39 Wash. 144, 81 Pac. 561. Under the test: "Does the information enable a person of common understanding to know what is intended?" this court has uniformly held that an information is sufficient if in the language of the statute. As to the specific claim that the information is deficient for failure to state the acts he committed, upon which it is charged he aided and abetted in the commission of the crime, this court has held such allegation unnecessary because of the statute requiring an accessory before the fact to be prosecuted as a principal. *State v. Golden*, 11 Wash. 422, 39 Pac. 646. To the same effect, see *Coffin v. United States*, 156 U. S. 432.

Assignments numbered 4, 6, and 7 may be considered together. The proof shows that, after Carl Brink took the mares, he sold them to H. J. Upham, at Hillyard, Washington, giving a bill of sale in an assumed name, and received a check, which he indorsed. These instruments, properly identified, were admitted in evidence. The witness Upham detailed the conversation and transaction with Carl Brink in the purchase of the team. Mrs. Carl Brink testified to driving the team with her husband to Hillyard, his sale of the team and receipt of the purchase price of \$300. The admission of the written instruments and the testimony of Upham and Mrs. Brink was over appellant's objections that they were hearsay and irrelevant. The

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evidence would have been admissible in a prosecution of Carl Brink, and therefore it was proper against appellant, an accessory before the fact, on trial as a principal. *State v. Mann, supra*.

Assignment of error No. 6 relates to testimony of Carl Brink as to a conversation with appellant over in the state of Idaho. The abstract shows it related to matters of minor importance, and that the testimony was received without any objections until, at the close, appellant moved to strike it. The record also shows, by the testimony of both Mr. and Mrs. Carl Brink, that it happened after the full agreement and plans for the theft had been made between appellant and Brink at the latter's home in Pend Oreille county, Washington. Subdivision 3 of § 2254, Rem. Code, provides for the punishment of a person who, being out of the state, counsels, procures, aids, or abets another to commit a crime in this state.

Assignments of error numbered 8, 9, 10 and 11 relate to written instruments concerning which there was substantial evidence to show that appellant had either procured a false writing or had altered the date of merchants' statements of sales to him in his efforts to sustain Brink's defense of an alibi in Brink's trial for this same larceny. The exhibits were proper evidence. *State v. Pettit*, 77 Wash. 67, 137 Pac. 335.

By assignment of error No. 12 a fatal variance is claimed between the allegation of the information that the mares stolen were the property of Cunningham Brothers and proof to the effect that they belonged to Levi Cunningham. This contention is predicated on the testimony of Levi Cunningham, a state's witness, who when asked: "You may state . . . if during the month of June you were the owner of a team of mares?" answered by saying "I was." And that

while thereafter the witness, speaking to the same subject, used the plural "we," appellant claims that the natural and legal inference in the use of the word "we" is that of husband and wife and not Cunningham Brothers. But counsel overlook the fact that this matter is made certain by Carl Brink himself, who twice testified the mares he stole belonged to Cunningham Brothers.

In the next assignment of error, fault is found with the trial court's definition of "reasonable doubt;" but, without quoting it, we find it to be clear, concise and complete.

In assignment No. 14 it is claimed there was error for the reason that the information, in charging the fact of aiding, assisting, etc., employs the words in the conjunctive, while the instructions mention them in the disjunctive. The contention is untenable. *State v. Pettit*, 74 Wash. 510, 133 Pac. 1014.

The next assignment of error refers to the court's instruction concerning accomplices. It is objected to as out of place because it was not shown that appellant did the actual stealing, and also because it invaded the province of the jury. As to the first, we have already seen that an accessory is tried as a principal, while as to the second objection, an examination shows the instruction contains no comment on the weight or value of the evidence, and further, the court instructed the jury to disregard anything that the court may have said having even the appearance of an opinion or comment upon the evidence.

Assignments numbered 16, 17 and 18 refer to instructions requested by appellant and refused. They are lengthy and we find no occasion to set them out in this opinion. One of them related to a matter which was specifically and properly covered by an instruc-

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tion given in language of the court's choosing. The other two related to the subject of the weight of the evidence and credibility of the witnesses, one of which, as requested, was an improper statement of the law. The subject-matter suggested by them was fully covered by an instruction given in the general and usual form concerning the weight of the evidence and the credibility of the witnesses.

In presenting the cause here, in support of the contention that he should have been granted a new trial, appellant, by his counsel, indulges in argument more appropriate to be addressed to a jury trying the case. We discover in the record ample testimony, if believed by the jury, to sustain the verdict.

The trial court properly denied appellant's motion in arrest of judgment, and followed the law in entering the judgment and imposing the sentence complained of.

Judgment affirmed.

CHADWICK, C. J., MACKINTOSH, TOLMAN, and MAIN, JJ., concur.

[No. 15150. Department Two. January 22, 1919.]

CONNECTICUT INVESTMENT COMPANY, *Respondent*, v.
GEORGE YOKOM, *Appellant*.¹

APPEAL (322-1)—RECORD—ABSTRACTS. A motion to strike is not the proper remedy to correct a defective abstract.

SAME (322-1). Where an abstract of the record fails to comply with Rule VI, giving the form and requiring the testimony to be set out in "chronological order," the appellant will be required, on motion, to prepare and file an abstract in conformity to the rule; and it is immaterial that the form used is claimed to conduce to clearness.

Motion filed in the supreme court December 2, 1918, to strike appellant's abstract and affirm the judgment, or to strike the abstract and require the filing of an abstract conforming to the rules of court. Granted as to second part of motion.

C. E. Ellis and *C. W. Swanson*, for appellant.
Zent & Powell, for respondent.

MAIN, J.—This is a motion by the respondent to strike the appellant's abstract and affirm the judgment, and, in the alternative, to strike the abstract and require the appellant to prepare and file an abstract in conformity with the rules of this court.

The first part of the motion cannot be granted. Laws of 1915, ch. 104, p. 302, § 6 (Rem. Code, § 1730-6). *Kranzusch v. Trustee Co.*, 93 Wash. 629, 161 Pac. 492; *Wishkah Boom Co. v. Greenwood Timber Co.*, 100 Wash. 472, 171 Pac. 234.

The second part of the motion requires consideration. The objection to the abstract appears to be that that portion thereof which is devoted to abstracting

¹Reported in 178 Pac. 628.

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the testimony is not in conformity with the rules. Rule VI sets out a form by which abstracts are to be prepared, and specifies in detail the method of their preparation. This rule, among other things, provides that, in all cases the events of the trial are to be followed in their "chronological" order. The portion of the rule which covers the method of abstracting the testimony and the form by which the testimony is to be abstracted is as follows:

"Evidence.

"Titus Oates was called and sworn as a witness on behalf of the plaintiff and in answer to interrogatories propounded to him by A. B., of the attorneys for the plaintiff, testified as follows:

(Set out his direct testimony in narrative, unless the question and answer is necessary to an understanding of the error claimed. If the witness identifies an exhibit, and the exhibit is introduced in evidence, insert a description of the same.)

"On cross-examination by C. D., of the attorneys for the defendant, he further testified as follows:

(Set out his cross-examination, following the form suggested for his direct testimony.)

"On re-direct examination, he further testified as follows:

(Set out the same. Continue in the same manner with respect to each witness sworn on behalf of the plaintiff. In all cases abstract only so much of the evidence as may be necessary to show the error involved; it is necessary to abstract the evidence in full only in those cases where the entire evidence is required to show the error.)" 71 Wash., p. xlv.

Under the heading of *Defendant's Evidence*, the rule provides as follows:

"Milton Giles was called and sworn as a witness on behalf of the defendant, and in answer to interrogatories propounded to him by E. F., of the attorneys for the defendant, testified as follows:

(Set out his testimony in the manner given for abstracting the evidence of the plaintiff's witnesses.)" 71 Wash. xlv.

Under these rules, it will be noted that the testimony is to be set out in narrative form, unless the question

and answer is necessary to an understanding of the error complained of. A form is given which is to be followed; the rule further providing that the testimony of each witness shall be abstracted in the same manner.

The abstract in question does not conform to the rules in setting out the testimony of the witnesses on direct, cross-examination and redirect examination, in continuity. The testimony, as abstracted, is under certain headings, such as *Bookkeeping*, *General items*, *Gray transaction*, *Position of the parties*, *Yokom land account*, etc., and under each one of these separate headings the testimony of all the witnesses who testified upon that particular subject-matter is apparently attempted to be assembled. This is not the method of abstracting recognized by the rules; neither is it in substantial conformity therewith. The appellant, however, contends that the method of abstracting which he has adopted conduces to clearness and makes the testimony more intelligible than it would be were it abstracted and set out in the manner required by the rule. Whether this is true or not cannot be determined at this time. For the purpose of determining whether the abstract conforms to the rules, it must be taken as it appears on its face and compared with the rule requirements. The fact, if it be a fact, that a method of abstracting, other than that required by the rule, may be better does not justify a departure from the rule. If the court should approve an abstract which is prepared in a manner substantially different from that required by the rules, it would lead to endless confusion. The door would be open for a party, when he conceived that he could abstract the testimony in a manner better than that provided in the rule, to depart therefrom and exercise his own judgment. The rule would soon become a nullity.

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Rule VII, among other things, provides that, when the respondent is not satisfied with appellant's abstract, he may file a supplemental abstract, which shall follow the form which the rules provide for the original abstract. If the respondent desires to resort to a supplemental abstract, he has a right to the privilege of preparing it in the form required by the rules. In this case, if the respondent should undertake to prepare a supplemental abstract to that of appellant, it would be required to adopt the form of appellant's abstract and depart from the form required by the rules. It follows that the motion must be granted as to that part of the abstract which is devoted to the abstracting of the testimony. As to the other parts of the abstract, they appear to be in substantial conformity to the requirements.

The appellant will be given thirty days in which to prepare and file an amended or supplemental abstract. It is so ordered.

MOUNT, FULLERTON, PARKER, and HOLCOMB, JJ., concur.

[No. 14784. Department Two. January 24, 1919.]

H. M. ROWAN, *Respondent*, v. UNITED STATES FIDELITY
& GUARANTY COMPANY *et al.*, *Appellants*.¹

FRAUDULENT CONVEYANCES (34, 92) — PREFERENCES — To RELATIVES — EVIDENCE — SUFFICIENCY. No fraudulent intent is shown by a sale by a father to a son of ten mules and other property in satisfaction of a debt for \$1,000, where the only evidence as to the consideration was that of father and son which showed it to be adequate, and if the father was insolvent at the time he did not know it.

SAME (41, 95) — PREFERENCES — RETAINING POSSESSION — INTENT — EVIDENCE — SUFFICIENCY. Fraudulent intent in the sale by a father to a son of ten mules and other property in satisfaction of a debt for \$1,000, is not shown by the fact that there was no apparent change of possession, where it appears that they were living together, the son ran the farm, paid the bills, and exercised exclusive control over the property and listed it for assessment as the owner.

Appeal from a judgment of the superior court for Benton county, Truax, J., entered February 28, 1918, upon findings in favor of the plaintiff, in an action of replevin, tried to the court. Affirmed.

Cassius E. Gates and *Nelson R. Anderson*, for appellants.

McGregor & Fristoe, for respondent.

MOUNT, J.—This appeal is from a judgment of the lower court awarding to the respondent the possession of ten mules and three horses.

It appears that, in the year 1915, W. B. Rowan, the father of the respondent, was the owner of these mules and other property. In February of 1916, the father was owing the son money. It was estimated that the debt was about \$1,000. In order to pay this debt, the father sold to the son the mules and horses in controversy here, together with other property, which they

¹Reported in 178 Pac. 473.

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estimated was of about the value of a thousand dollars. At that time, the father, his wife and two other boys were living with the son, the respondent here. The respondent took possession of the property, and in March of 1916, as owner, listed it with the assessor for assessment; and, in the year 1917, the respondent also listed the property with the assessor, and afterwards, long before the property was seized, paid the taxes thereon. On March 31, 1917, the United States Fidelity & Guaranty Company recovered a judgment in the superior court of King county in the sum of \$558.27 against W. B. Rowan and A. P. Anderson, co-partners doing business as Rowan & Anderson. Thereafter, the United States Fidelity & Guaranty Company caused a writ of execution to be issued upon the King county judgment and placed this writ in the hands of the sheriff of Benton county. The sheriff, on the 19th of November, 1917, by virtue of the writ of execution, seized the ten mules and three horses in controversy here as the property of W. B. Rowan. Thereafter, on the 20th day of November, 1917, H. M. Rowan, the respondent, filed the statutory affidavit, claiming the property, and gave a bond and retook the property from the sheriff. Thereafter, the claim of the respondent, as the owner of the property, was tried to the court without a jury. At the conclusion of the evidence, the court made findings in favor of the respondent and entered judgment accordingly. This appeal followed.

It is argued by the appellant that the father of the respondent was insolvent at the time of the transfer of the property to his son; that there was an inadequate consideration; that there was no visible change of possession; that the indebtedness was exaggerated; and that, for all of these reasons, the transfer from

the father to the son was fraudulent and void as to existing creditors. The only evidence in the case was that of the father and son. The case depends almost wholly upon a question of fact. If the testimony of the father and son is to be believed, there was an adequate consideration for the transfer. If, as a matter of fact, the father of the respondent was insolvent at the time of the sale, we are clearly of the opinion, from the record before us, that he did not know it. It is true the greater portion of the father's property was mortgaged, but, outside of his mortgage indebtedness, the debt owing appellants was the only other debt then against him. He claimed that there was enough equity in his mortgaged property to more than pay his other debts at the time of the sale. If these facts are to be believed, there was no fraudulent intent.

It is shown that there was no apparent change in the possession of the mules and horses at the time of the sale. The father and son were living together as one family. There was no bill of sale, and it was probably not generally known in the neighborhood that the father had sold these mules and horses to his son; but the son testified that, immediately after the sale, he took possession of the mules and horses; that he exercised exclusive control over them, fed them, paid pasturage upon them, and gave them in to the assessor as his property, and paid taxes thereon. We think this shows as much of a changed possession as the circumstances and condition of the property required. The appellant here relies upon fraud as vitiating the sale. It devolved upon the appellant to show fraud. Aside from the circumstances which we have above related, namely, the fact that there was no visible change of possession, and the fact that the son purchased the property from the father, there is

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no evidence of fraud, and, as showing the good faith of the transaction, the father and son both testified to facts which tended at least to show good faith. They testified that the father lived with the son, and that the son was really the head of the family, took charge of the farm which he was operating, paid all the bills, and gave the property in to the assessor as his own, and paid taxes thereon. It seems, in view of these facts, as testified to and not disputed, that the trial court properly concluded that the transfer was in good faith and for a valuable consideration, and, therefore, that the son was the owner of the property levied upon.

The judgment must therefore be affirmed.

MAIN, FULLERTON, PARKER, and HOLCOMB, JJ.,
concur.

[No. 14908. Department One. January 24, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
WILLIAM K. LYLE, *Appellant*.¹

CRIMINAL LAW (387)—APPEAL—OBJECTIONS—TO EVIDENCE. In a prosecution of a druggist for an illegal sale of intoxicating liquor, error cannot be predicated upon the admission of the defendant's register showing a thousand other sales within the preceding six months, where the defendant did not request that the page showing the sale in question be detached and the balance of the book excluded.

SAME (451)—REVIEW—HARMLESS ERROR—ARGUMENT OF COUNSEL. In a prosecution of a druggist for an illegal sale of intoxicating liquors, misconduct of the prosecuting attorney in directing the jury's attention to the pages of the druggist's register showing other sales is cured by an instruction that the register could be considered only as it relates to the sale in question, and to disregard the statements of counsel.

SAME (363)—NEW TRIAL (49)—AFFIDAVITS OF JURORS—IMPEACHMENT OF VERDICT. A verdict of conviction of a druggist of illegally

¹Reported in 178 Pac. 468.

selling intoxicating liquor cannot be impeached by affidavits of the jurors that they considered, and that the verdict was based upon, the druggist's entire register, only one page of which was material under the court's instructions.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered May 13, 1918, upon a trial and conviction of violating the prohibition law. Affirmed.

Snively & Bounds, for appellant.

O. R. Schumann and *J. Lenox Ward*, for respondent.

MACKINTOSH, J.—The appellant, a druggist, was convicted before a jury of having unlawfully sold intoxicating liquor. The state introduced as one of its exhibits the druggist's register showing the sale of alcohol to the prosecuting witness. The book also contained a record of some thousand other sales occurring in the six months preceding the sale in question. The page of the register upon which appeared the sale to the prosecuting witness was the only page material to the case, but the entire book was actually physically in the possession of the jury, the one page on which appeared the prosecuting witness' signature, and which was the only page marked as an exhibit, not having been detached from the balance of the book. At no time had the appellant requested that this page be separated from the other pages, and, by allowing the entire book to be received, he must be held to have accepted the possibility of having the jury inspect the entire register, and it is too late for him now to complain of that as error. He must have known that, although the court instructed the jury that the one page only was in evidence, jurors are sometimes curious and are liable to turn over the leaves to see what may be discovered on the other pages. The way to have

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protected himself against this would have been to have insisted that the page which was properly admissible in evidence be separated from the balance of the book.

The appellant claims that the presentation of the entire book was prejudicial to him in an additional way; that counsel for the state, in arguing to the jury, called its attention to the fact that there were a great number of sales recorded in the register, and asked the jury to look over the names of the persons appearing upon the register and determine "how many names you will recognize, and how many names you will find upon the Yakima county tax lists." Exception was taken to these remarks, and the jury was instructed by the court, as he had theretofore instructed it, that it was not to consider the register for any purpose "except as it relates to the transaction in which the prosecuting witness had a part, and any statement made by counsel regarding the book or what it shows, not in connection with that transaction, should be wholly disregarded, as it has no bearing on the case." The misconduct of counsel for the state was cured by this instruction.

It is further contended that the affidavits taken from the jurors show that the jurors in their deliberations considered the entire register, and that this was a determining factor in their verdict. We take it that these affidavits are an attempt by the jurors making them to impeach their own verdict, and for that reason they cannot be received. The two other errors assigned possess no merit. The judgment is affirmed.

CHADWICK, C. J., MITCHELL, TOLMAN, and MAIN, JJ., concur.

[No. 15001. Department Two. January 24, 1919.]

DAVID TYRELL, *Appellant*, v. R. H. LEEGE *et al.*,
Respondents.¹

MUNICIPAL CORPORATIONS (383)—USE OF HIGHWAY—CONTRIBUTORY NEGLIGENCE—COLLIDING WITH AUTOMOBILE. One riding a bicycle near the middle of a city street in the daytime, with a plain view ahead for several blocks, is guilty of contributory negligence, as a matter of law, in failing to see and in colliding with an automobile, driven in a straight line in the opposite direction, there being no other vehicle near.

APPEAL (432)—REVIEW—HARMLESS ERROR—PARTY NOT ENTITLED IN ANY EVENT. In an action for negligence, error in excluding evidence as to defendant's negligence is harmless where the plaintiff was guilty of contributory negligence as a matter of law.

SAME (263, 276)—RECORD—EVIDENCE—NECESSITY. Error cannot be predicated on the refusal to reopen a case for further evidence, where the record does not disclose the nature of the evidence or show any abuse of discretion.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered February 19, 1918, upon granting a nonsuit, dismissing an action for personal injuries sustained through a collision with an automobile. Affirmed.

J. Y. Kennedy and *W. H. Mason*, for appellant.

John L. Samsel, for respondents.

PARKER, J.—The plaintiff Tyrell seeks recovery of damages for personal injuries which he claims resulted to him from the negligence of the defendant Leege in the driving of an automobile for the marital community of himself and wife. The case proceeded to trial in the superior court sitting with a jury. At the conclusion of the evidence introduced in behalf of plaintiff, counsel for defendants moved for a non-

¹Reported in 178 Pac. 467.

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suit, upon the ground that the evidence failed to show negligence on the part of the defendants, and that it showed plaintiff's injuries to be the result of his own contributory negligence, and asked the trial court to so decide, as a matter of law, and take the case from the jury, which motion was granted upon the ground that the evidence conclusively showed, as a matter of law, that plaintiff could not recover because of his own contributory negligence. From this disposition of the case, plaintiff has appealed to this court.

At the time appellant was injured, near the middle of the day, he was riding his bicycle east along, and near the middle of, Everett avenue, in the city of Everett. He had a plain view ahead of him for several blocks. He came in collision with an automobile being driven by respondent Leege in the opposite direction, at a point near the center line of the avenue. The evidence tends to show that Leege was, in some measure, negligent, in that he was driving, at a possibly slightly excessive rate of speed, near, or possibly a little to the south of, the center line of the avenue; but there is no evidence indicating that he was negligent in any other respect. It is plain that he was driving, in a comparatively straight direction, towards the west along the avenue, and in such a manner that one seeing his machine approaching would not be deceived as to the course he was taking, or would probably continue in taking. There was no other vehicle upon the avenue near the place of the collision at that time. Appellant testified that he did not see any automobile or vehicle approaching him from the east until the moment he was struck by respondents' automobile and received the injuries for which he seeks recovery, although riding his bicycle east along the avenue practically on a line on which respondents' automobile was

approaching from the east. The testimony of appellant's witnesses is in harmony with his own, except they did not pretend to say that he did, or did not, actually see respondents' automobile approaching. Upon these facts, which we think the testimony of appellant and his own witnesses conclusively shows to have existed at the time, counsel for appellant contend that the court erred in deciding, as a matter of law, that he was guilty of contributory negligence precluding recovery. While this is the principal ground relied upon by counsel for reversal, it is but very briefly argued. We are of the opinion that the court correctly held, as a matter of law, that he was guilty of contributory negligence resulting in his injuries, and therefore could not recover, even conceding that respondent Leege was in some degree negligent. *Borg v. Spokane Toilet Supply Co.*, 50 Wash. 204, 96 Pac. 1037, 19 L. R. A. (N. S.) 160.

Some contention is made in appellant's behalf that the court erred in excluding certain offered evidence. We think it sufficient to say, in answer to this contention, that the evidence so offered and excluded would, in no event, have called for a different decision by the trial court, since it only related to respondents' alleged negligence, and did not show any different situation than as above stated by us. Its exclusion was, therefore, not prejudicial to appellant's rights.

Some contention is made that the court erred in refusing to reopen the case for the receiving of further evidence in appellant's behalf, after ruling upon the motion and before the entry of final judgment in accordance therewith. The record is not sufficient to enable us to tell whether or not the court abused its discretion in this respect, since it does not appear what the nature of the evidence was which was sought

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Statement of Case.

to be introduced, nor what excuse was relied upon for not introducing it before the court ruled upon the motion for nonsuit.

Counsel for respondent have moved to strike the statement of facts, because of alleged irregularities in the settling of the same by the court. The record seeming to us to so plainly demonstrate the correctness of the court's disposition of the case upon the merits, we have concluded to rest our affirmance of the judgment thereon. This renders it unnecessary to notice the motion to strike the statement of facts.

The judgment is affirmed.

MOUNT, MAIN, FULLERTON, and HOLCOMB, JJ., concur.

[No. 15030. Department Two. January 24, 1919.]

GUS VERGONIS, *Respondent*, v. JIM VASELEOU,
Appellant.¹

APPEAL (117)—PRESERVATION OF GROUNDS—OBJECTIONS TO COMPLAINT. In an action to recover goods conditionally sold, objection that the complaint did not tender, for surrender and cancellation, the notes given for the purchase price cannot be first made on appeal, where the notes were introduced in evidence and cancelled by the judgment.

TENDER (7)—CONDITIONS—CONDITIONAL SALES CONTRACT. A tender of the sum due on a conditional sales contract, conditioned on receiving an absolute conveyance of the property, is insufficient, where payment was a condition precedent to passing title, and the contract provided that title should be absolute on full payment and did not contemplate any additional conveyance.

SAME (4)—MODE AND SUFFICIENCY—PAYMENT INTO COURT. After suit brought, it is not a sufficient tender to leave money with a third person to be handed to plaintiff's attorney, and in the case of a legal action, to fail to bring the money into court.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered June 25, 1918, upon

¹Reported in 178 Pac. 463.

findings in favor of the plaintiff, in an action of replevin, tried to the court. Affirmed.

Robert G. Chambers, for appellant.

Geo. T. Swasey, for respondent.

FULLERTON, J.—On November 28, 1917, the respondent, by contract of conditional sale, transferred to the appellant and another a restaurant with its furnishings, situated in the city of Raymond, in this state. The sale price was \$1,000, upon which a cash payment was made of \$600, and four notes of \$100 each given, maturing December 28, 1917, January 28, February 28, and March 28, 1918, respectively. These notes were placed for collection with a bank at South Bend, and the first two of the notes were paid as they matured. The remaining notes were not paid and, shortly after the maturity of the last of the notes, this action in replevin was begun by the respondent to recover possession of the property. The complaint was in form that is usual and customary under our practice to recover property in specie. The appellant answered, putting in issue the traversable allegations of the complaint, and pleading by way of a separate answer a tender of payment of the amount due on the notes, both prior to, and after the commencement of, the action, averring that the latter tender included the accrued costs. He also, in his answer, offered to pay the notes and such further sum as the court should adjudge to be due the respondent. He did not, however, bring into court for the respondent the amount tendered. A trial was had before the court sitting without a jury, and resulted in a judgment allowing a recovery of the property.

The appellant first complains of the ruling of the court overruling his objections to the sufficiency of the

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complaint and to the sufficiency of the evidence to sustain a judgment against him, and urges in this court that neither the complaint nor the evidence is sufficient to sustain the judgment entered. The conclusion is founded on the fact that the respondent did not tender in his complaint, for surrender and cancellation, the unpaid notes. Since, in this state, the rule is that a vendor in a contract of conditional sale cannot retake the property conditionally sold and recover the unpaid portion of the purchase price—that the election of the one remedy is a waiver of the other—it may be that good pleading would require the vendor to tender in his complaint any obligation given to evidence such purchase price when return of the property is sought, but the objection was waived in this instance. The complaint was not attacked, either by motion or demurrer, nor was the particular objection taken by the answer filed. On the trial of the cause, the notes were produced as a part of respondent's evidence in chief, filed in the cause, and were canceled by the judgment of the court finally entered. In the end, the appellant obtained all the relief in this regard to which he would have been entitled had he objected at the proper time, and no error can now be predicated because of the informality of the methods by which such relief was reached.

The principal defense was that of tender. It is not necessary to recite the several acts of the appellant constituting the supposed tenders, but they were clearly insufficient. He seems to have conceived the idea that he was entitled to some form of absolute conveyance of the property as a condition precedent to the final payment, and all of the tenders made prior to the commencement of the action, conceding them to be sufficient in other respects, were made subject to

such a condition. But the contract did not warrant this conclusion. The appellant was obligated to pay as the installments matured, and the contract, by its terms, provided that his title to the property should become absolute on full payment. The contract neither provided for, nor contemplated, any additional evidence of title, and, conceding that the appellant may have been entitled to some form of cancellation of the contract from the fact that it had been placed of record, this right would arise only after the purchase price was paid. The obligation to pay and the obligation to cancel were not mutual, concurrent or dependent.

The tender after action was brought was insufficient because not made to the respondent nor any one representing the respondent. The money was left with a third person to be handed the respondent's attorney, and aside from the fact that the evidence fails to show that it was ever tendered him, even informally, the act itself was not a compliance with the formal rules of tender. But, more than this, the money tendered was not brought into court. It is true that we have held in actions of equitable cognizance, where the plaintiff must rely upon equitable principles to sustain his cause of action, that it is sufficient to plead willingness to pay without an actual bringing of the money into court. But the present action is a legal action, to which the plea of tender is a legal defense, and the rule cited is without application.

There is no reversible error in the record, and the judgment will stand affirmed.

PARKER, MOUNT, and MAIN, JJ., concur.

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[No. 14813. Department One. January 24, 1919.]

MAGGIE WALL, *Respondent*, v. ESTATE OF
MARY McENNERY *et al.*, *Appellants*.¹

ADOPTION—BY CONTRACT—VALIDITY. There being no right of adoption at common law, an agreement for an adoption prior to the passage of the first territorial act authorizing adoptions in this state, is not valid to give the status of an heir under the laws of inheritance.

SPECIFIC PERFORMANCE (11) — CONTRACTS ENFORCEABLE — INVALID CONTRACT FOR ADOPTION. A contract for adoption will not be specifically enforced, so as to give a right of inheritance, because of a good faith attempt to make the adoption by contract, where there was at the time no authority in law for an adoption.

SAME (25, 51)—WILLS (8-1)—CONTRACT TO DEVISE—EVIDENCE—SUFFICIENCY. A contract by foster parents to "leave" property in consideration of services performed by one who was never legally adopted, will not be specifically enforced unless clearly proved, and it is not sufficient to show services as a child, that she was sent to school, and that the foster parents had stated that they had adopted her, and that she was their heir and would inherit their property without the making of any will.

Appeal from a judgment of the superior court for Garfield county, Miller, J., entered September 17, 1917, upon findings in favor of the plaintiff, in an action for specific performance, tried to the court. Reversed.

Kuykendall & McCabe and *S. O. Tannahill*, for appellants.

G. W. Jewett and *Losey & Newton*, for respondent.

CHADWICK, C. J.—Maggie Wall, the respondent, was born about the year 1866. When about two years old her father died. Her mother put her in a charitable institution. Afterwards, possibly in the year 1871 or 1872, one James Newman and wife were given the custody of the child.

¹Reported in 178 Pac. 631.

Respondent says that she was adopted and went to live with the Newman family on a large ranch near Sacramento. There is no evidence of an adoption. Adoption by the Newmans is assumed rather by counsel from a lack of evidence, a showing being made that the court records in San Francisco county, California, were destroyed in the fire that followed the earthquake in the year 1905.

Respondent came with the Newmans to Washington Territory in the year 1872. The family settled near Dayton, Washington. In 1872 or 1873, respondent was surrendered to William and Mary McEnnery. She says that she went with the Newmans to a lawyer's office in the then town of Dayton, that the lawyer drew a contract which Mr. and Mrs. Newman signed, on the one hand, and Mr. and Mrs. McEnnery, on the other.

Respondent then went with the McEnnerys and lived with them until about 1880, when she was sent to the Sisters' School at Vancouver, Washington. She was known as Maggie McEnnery, and it seems to have been the understanding of many who knew the McEnnerys in the then sparsely settled country that the girl had been adopted. She was baptized in 1877 by Father Giroda, as "Maggie, born 13th of April, 1867, from certain McCue in California, but now adopted by William McEnnery. The God-mother was McEnnery."

That respondent was not adopted under any law providing for adoption is now confessed, for, at the time, the only lawful way to adopt a child was by act of the territorial legislature. A general law giving jurisdiction over adoptions to the district courts was not passed until 1875. Laws 1875, pp. 110-112; Rem. Code, § 1696.

The contract relied on, now claimed to be lost, is the paper drawn up by the lawyer in Dayton, and

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which, under the law as it was at that time, must have been as much a contract to relieve Newman of his responsibility for the child as to give its custody to the McEnnerys.

Respondent alleges in her complaint:

“And in accordance with the understanding and agreement, and about the year 1873, said William McEnnery and Mary McEnnery, at the town of Dayton, in the state of Washington, in the presence of one Mike Buckley, and one William Green, and a certain lawyer, whose name is at this time unknown to plaintiff, did enter into a written agreement with said James Newman, for the use and benefit of the plaintiff herein, wherein and whereby as plaintiff is informed and believes, and therefore alleges the fact to be, said William McEnnery and Mary McEnnery agreed to adopt and did adopt plaintiff, and agreed that plaintiff should at all times thereafter possess, enjoy, and have all the rights and privileges of a child of said William and Mary McEnnery, and that upon the death of said McEnnerys, all their property, if they had no children, and if they did have other children, then a child's portion of their property, should be left to the plaintiff.”

As it comes to us, the case presents itself as two distinct questions: (a) Whether a contract for adoption is valid to give respondent the status of an heir under the laws of inheritance; and (b) if it is not, whether a contract of the alleged foster parents to leave their property to respondent has been proved with sufficient certainty to call for a decree of specific performance.

We are unwilling to give our sanction to the first proposition. At the time the contract was entered into, we had no statute authorizing the adoption of infants.

“The right of adoption, while known to the ancients of Greece and Rome, and probably to other ancient peoples, and while practiced among many of the con-

tinental nations under the civil law from the remotest antiquity, is not recognized by the common law of England, and exists in the United States only by virtue of the statutes which have been enacted in many if not all of the states." 1 R. C. L. 593.

The right of adoption was repugnant to the principles of the common law. *Ferguson v. Jones*, 17 Ore. 204, 20 Pac. 842, 11 Am. St. 808, 3 L. R. A. 620.

There being no right of adoption at common law, it follows that there can be no adoption by parol. *In re Carroll's Estate*, 219 Pa. St. 440, 68 Atl. 1038, 123 Am. St. 673.

In *In re Renton's Estate*, 10 Wash. 533, 39 Pac. 145, the exclusiveness of the statutory method of adoption is recognized. There the contestants of the will of William Renton, being children of his wife by a former husband, sought to establish an adoption upon facts showing every element of a family relation. The court said:

"But the answer to these positions is, in the first place, that adoption has never been sustained by mere presumptions, and that the doctrine of title by adverse possession is one adopted by the law for the sake of quieting disputes and not for the purpose of furnishing a ground for raising them. Without a statute, or without compliance with a statute, there is no such thing in our law as the adoption of an heir. Adoption was not known to the common law, and is a matter purely statutory. Courts have passed upon this question frequently, and have adhered with much strictness to this rule."

But counsel maintain that a good faith attempt having been made to make an adoption by deed, or by contract, the court should enforce the contract as a contract to adopt. They cite many cases.

The foundation of respondent's case is well dressed for its setting by the reporter in *Pemberton v. Pemberton's Heirs*, 76 Neb. 669, 107 N. W. 996:

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“A contract in writing for the adoption of a child, although ineffective as a legal, statutory adoption, may upon a proper showing be enforced in equity.”

But, in almost all the cases relied on, there might have been a legal statutory adoption. The parties attempted to do that which had the sanction of the law, but failed to pursue the statutory method; or, the contract being otherwise legal, failed for the want of some formality. They had failed either to obtain the sanction of a court having jurisdiction, or had failed to contract in the manner provided by law. The *relation*, whether founded in decree, contract, or the equities arising out of an agreement to adopt, had the sanction of statute. To hold that a contract to adopt would give a right of inheritance, in the absence of a statute permitting such relation, would be to hold that that could be done indirectly which could not be done directly.

If there can be no adoption by contract, it follows that equity cannot enforce an agreement to adopt, for the subject-matter of the contract had no countenance in law at the time the writing was entered into. Equity will take jurisdiction to do justice in all those things whereof the law, by reason of its universality, is deficient, and it will give a remedy for every wrong, but it will not create a legal right, in the absence of legislation or some sustaining principle of the common law. Equity is essentially and thoroughly remedial and it will never extend its hand to defeat the policy of the law.

The policy of the law may be declared by legislative enactment, or if the common law be certain by the want of legislative enactment—the adoption of children being in derogation of common law, and there being no statutory method provided by the legislature

at the time the contract is said to have been entered into—it logically follows that there can be no adoption from which a right of inheritance would flow, unless it is accomplished by or through some method recognized by law, either under a general law or by special act of the law making power. The mere living of a child with those who have assumed a care and custody over its person will not make an adoption, although the child may believe that it has been adopted and such belief may be sustained by family tradition or by neighborhood gossip.

A law providing for the adoption of children was passed in New York in 1873, Laws of 1873, ch. 830, but with a saving clause.

“Nothing herein contained shall prevent proof of the adoption of any child, heretofore made according to any method practiced in this state, from being received in evidence, nor such an adoption from having the effect of an adoption hereunder.”

The New York court, being mindful of the repugnancy of the common law to adoptions, held:

“While there has been some diversity of opinion in the lower courts as to the precise meaning of this clause, we think the only construction permissible is that it refers to those forms of adoption theretofore existing by virtue of special statutory enactments contained in the charters of charitable societies that received destitute and homeless children, and whose officers were permitted to execute agreements of adoption on their behalf with suitable persons willing to assume the obligations of parents. . . . It is obvious that the legislature did not have in contemplation the legalizing of private agreements executed without authority of law and containing no safeguards or restrictions of any kind as to the transmission of property. Any such construction of the saving clause in the act of 1873 might seriously affect the titles to real estate and introduce many elements of danger.

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“It follows that the agreement in this case, relied on to create the relation of foster parents and adopted child, worked no such result.” *In re Thorne's Will*, 155 N. Y. 140, 49 N. E. 661.

No attempt was made to save existing contracts in our statute.

See, also, *Smith v. Allen*, 161 N. Y. 478, 55 N. E. 1056; *Wallace v. Rappleye*, 103 Ill. 229; *Davis v. Jones' Adm'r*, 94 Ky. 320, 22 S. W. 331, 42 Am. St. 360; *Shearer v. Weaver*, 56 Iowa 578, 9 N. W. 907; *Renz v. Drury*, 57 Kan. 84, 45 Pac. 71; *In re Johnson's Estate*, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380; *Albring v. Ward*, 137 Mich. 352, 100 N. W. 609; *Bowins v. English*, 138 Mich. 178, 101 N. W. 204.

There are a few cases which seemingly hold to the contrary. In *Burns v. Smith*, 21 Mont. 251, 53 Pac. 742, 69 Am. St. 653, a contract to adopt, there being no statute, was enforced in equity, but the recovery was not based on a right of inheritance growing out of the contract to adopt, but upon a specific promise by the deceased person to leave a definite share of his property in return for services rendered. The invalidity of the contract as one of adoption was admitted. So, in *Wright v. Wright*, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196, it was held that a contract would be enforced where the statute, under which it had been drawn, had been held to be unconstitutional. The case was distinguished, if not overruled, in *Albring v. Ward*, *supra*.

Wherever the doctrine that a child adopted by contract can take as an heir under the laws of inheritance, there being no statute of adoption, has been asserted, we find that it springs from certain New Jersey cases; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370; *Van Tine v. Van Tine* (N. J.), 15 Atl. 249, 1 L. R. A. 155. At the time these cases were decided, there were no statutes

of adoption in the state of New Jersey. Contracts of adoption were upheld and specifically enforced on the facts, but, so far as the decisions indicate, the question we have for decision was not raised or discussed. They cannot be accepted in reason, for, as is said in *In re Carroll's Estate, supra*:

"The personal attitude of the inmates of a family towards an adopted child, as regards the family relation, is a matter entirely for the parties. But the matter of inheritance is entirely under the regulation of the law. The right to take property by devise or descent is the creation of the law, and not a natural right."

The true distinction is pointed out in *Chehak v. Battles*, 133 Iowa 107, 110 N. W. 330, 8 L. R. A. (N. S.) 1130, where the case of *Shearer v. Weaver, supra*, is distinguished. Of that case, the court says, at pages 113, 114:

"It is manifest from this language that the court proceeded on the theory that the grantee of the child Isaac was basing his demand for the property on the ground that Isaac had inherited it, and we are in full accord with the proposition that the right of inheritance as such may be conferred upon a stranger in blood only by pursuing the method prescribed by statute. The authorities upholding the right to specific performance never decree that the child is entitled to the right of inheritance as an heir."

There is much of loose expression in the books. Some of the courts have fallen into the error of saying that, although a contract for the adoption of a child be not sustained by a judicial proceeding or by a contract authorized by law, it is nevertheless good as a contract to adopt, and an action for specific performance will lie.

The case of *Pemberton v. Pemberton's Heirs, supra*, is illustrative. The court quotes with evident

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approval *Healey v. Simpson*, 113 Mo. 340, 20 S. W. 881, as follows:

“The instrument of writing in question cannot operate as an adoption, as it did not come up to legal requirements, but it can operate as a contract for adoption, which may, upon a proper showing, be specifically enforced in equity.”

And similar expressions may be found in other cases; but, as we have noticed, in practically every case where the courts have resorted to such language, the relation had received the sanction of legislative authority. But, over and beyond this consideration, the cases were not turned upon a contract to adopt, for, in the final analysis, specific performance was decreed upon the ground that the child had rendered services under a contract the consideration for which was the bequeathing of the property of the other contracting party. The question of adoption would neither add to, nor take from, the rights of either party. It may be further noted that, in all the cases, the contract was certain as to its terms, the writing was produced, or the testimony left no question of doubt, for, as said in the *Pemberton* case, the form and regularity of the contract as a deed of adoption is wholly immaterial, but the contract to leave the property would be enforced as a contract between the natural mother, legally entitled to the care of the child, and the alleged foster parents. The contract of which equity will take notice goes to property and not to the person or to the personal relations of the parties, except as they throw light upon disputes arising as to its terms.

We find, upon the first premise, therefore, that respondent cannot claim a right of property as an adopted child, for such rights depend upon the law and not upon contract.

If, then, respondent is to recover, it must be in virtue of the contract which she says was entered into in her behalf, the consideration for which was service on her part and for which she was to obtain all the property of the McEnnerys if they died leaving no children.

It is said in one of the cases that the power of a court of equity to grant relief in this class of cases is extraordinary. The rule of evidence applied is the same as where an action is brought to compel the specific performance of a parol contract to convey land. The contract must be established beyond serious doubt.

“In *Walpole v. Oxford*, 3 Ves. 419, the Lord Chancellor laid it down as a general proposition that all agreements, in order to be executed in a court of equity, must be certain and defined, equal and fair, and proved in such manner as the law requires, and that it was enough to doubt in such respect to refuse relief.” *Wallace v. Rappleye*, *supra*.

This must necessarily be so in all cases where the contract would be void under the statute of frauds but for a sufficient part performance. Wherefore, before a contract can be enforced, it must be proved. No serious or, as many of the books say, no reasonable doubt should remain as to the terms of the contract. It must appear that a denial of the remedy would work a fraud upon the complaining party. *Wallace v. Rappleye*, *Renz v. Drury*, and *Smith v. Allen*, *supra*; *Willoughby v. Motley*, 83 Ky. 297; *Keegan v. Geraghty*, 101 Ill. 26; *Baumann v. Kusian*, 164 Cal. 582, 129 Pac. 986, 44 L. R. A. (N. S.) 756.

In cases of this kind, the fact that there was a parol contract of adoption, or a parol contract to adopt, or a lost writing to be proved by parol, will not support a contract to “leave” property that equity will

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enforce, for a legal contract of adoption, or to adopt, merely implies that the child will take by inheritance if any property remains for distribution. *Davis v. Hendricks*, 99 Mo. 478, 12 S. W. 887.

It does not imply a specific promise to "leave" any property whatsoever to the adopted child.

"Void articles of adoption are no evidence of themselves of a contract for an interest in property, real or personal." *Albring v. Ward*, *supra*.

Wherefore—and this disposes of much of the testimony offered on behalf of respondent—family tradition, neighborhood gossip, and all forms of hearsay, including baptismal records, so often relied upon for the want of better evidence, is of little weight to prove a contract to "leave" property at the death of the adopter.

The fact that respondent went to live with the McEnnerys, that they received her services as a child, and sent her to school, are all circumstances that would tend to prove an adoption, if an adoption by contract were possible, but they fall far short of proving a contract to "leave" property, as alleged in the complaint. To recover, respondent must prove a contract of purchase. The mere fact of service in the household of the foster parents would not be proof of a consideration, in the absence of proof, at least reasonably certain, that the McEnnerys, at the time that it is said that the contract was entered into, agreed in terms to "leave" their property to respondent, for, although they had actually adopted respondent, they were under no moral or legal obligation to leave their property to her in the event of death. It is not enough that they may have so obligated themselves; it must be shown as the first truth in the case, and without it the suit cannot go on.

“Some witnesses testified to statements made by Mr. and Mrs. Ward in which they spoke of her as their daughter, and that she called them father and mother. Such statements are consistent with the theory of supposed legal adoption. They are not evidence of a contract to make her an heir, or to convey her any property. If there were any evidence of a legal contract on the part of Mr. Ward to make complainant his heir, such statements might be of some value in proof of the contract.” *Albring v. Ward, supra.*

The testimony relied on to show a contract to leave the property to respondent is as follows:

Jane Branton:

“In '78 or '80, I heard Mrs. McEnnery speak of their relationship with Maggie. It was at my sister's, Mrs. Milan's. Mrs. Milan and I were at the corner talking and Mrs. McEnnery came along and got into conversation with us. Mrs. McEnnery said they had Maggie, so no one could take her away from them, had a lawyer at Dayton fix the papers up between them and the Newmans. She said the papers were about the adoption of Maggie; that they had adopted her, were to educate her, give her their property, at their death she was to become their heir and that was what they adopted her for. I had a conversation with Mr. McEnnery six years ago. He asked me if I didn't remember Maggie, and said she would get his property when they died, because they had adopted her. He did not mention any contract or papers.”

Mary E. Milan:

“I had a conversation with Mrs. McEnnery about Maggie. I am not positive as to the year. Mrs. Branton was there at the time. She was then thirteen or fourteen years old. Mrs. Branton said, ‘You ought to have some one to leave your property to,’ and she said she did, that she had adopted Maggie, and took the little child and wanted her to have what belonged to her. She said the papers had been made out for Maggie, showing that Maggie would get their property. I

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think this conversation took place in '69. As to the time, I don't remember much about it; it might have been about '70. I was about thirty-one or two. I am now past sixty."

Mrs. Emma Whitmore:

"I knew William and Mary McEnnery during their lifetime. I had a conversation with Mrs. McEnnery about Maggie some seven years ago. She said she had gotten Maggie from Dayton from the Newmans; that she had entered into a writing; that Maggie was her daughter and would have their property at their death."

E. V. Gibson:

"I have heard them talk about Maggie, but Bill never said much about her, the old lady did most of the talking. Mrs. McEnnery said that she didn't have to make any will. 'That is all fixed, our property will go to Maggie, she is our adopted child.' She didn't say whether there was any writing at all. She just said, 'That is already fixed.' I had a conversation some time after that with Mrs. McEnnery. They were getting old, she said, and when they got through with it, it would go to Maggie. Nothing was said about a will."

Mrs. Wilmina Tupper:

"I had a conversation with Mr. McEnnery, Mrs. McEnnery being present, about making a will, the next spring after they moved to town. One of them said that they had a very pretty little girl, and I asked if it was hers and she said no, it was an adopted child, that she was then at school, and he said that he was going down there the next day to see her. He said he had papers in his pocket that was her adoption papers. The way Mrs. McEnnery talked about it, I understood that Maggie was to have their home property at their death. That conversation was about a month after I became acquainted with them, about twenty-four years ago."

Mrs. Melina Gibson:

"I knew William and Mrs. Mary McEnnery very well, lived by them twenty-one or twenty-two years. I never saw Maggie until she was grown up. Mrs. McEnnery said Maggie was their adopted daughter; that they had adopted her many years ago when they lived on the Pataha creek. She spoke of the papers as the adoption papers. She said Maggie would have their property when they were done with it. She was a woman who never told any of the particulars of a business. I never talked particularly with Mr. McEnnery, but he always spoke of Maggie as their adopted daughter and seemed to think a whole lot of her. He never said anything about Maggie and their property. They never spoke of Maggie very often."

Mrs. Leona E. Davis:

"I knew Mr. and Mrs. McEnnery. I was working for Mrs. Henry Day, and while I was there Mrs. McEnnery visited Mrs. Day and I overheard conversations between them in regard to Maggie. I heard Mrs. McEnnery say one day she had never had any babies, and a year ago she adopted a child. I heard a conversation one time where something was said about adoption papers, but that is all I could tell."

A. A. Owsley:

"I knew Mr. and Mrs. McEnnery when they lived on the Pataha, and know about the time they took the little girl. I think it was in the year '73 when I first saw the girl. I had talked with McEnnery regarding this girl. Bill said it was his child, but it was adopted, or going to be, that he was going to adopt it. He asked me about adopting the girl, and under what law he would have to adopt her. He wanted the papers made up so she would be his child legally, and would look after them when they got old. I had a conversation with him when he came back. He said he had agreed to take the child and raise her and give her a good education, and when he died she would heir their property. After she went to school, he told me that he had sent her there to give her a good education to

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take care of them and their property and to be obedient. I have taken quite an interest in this case and have talked to the neighbors about it. I want to see Maggie win out. I consider it my duty to help her. Mrs. Milan and Mrs. Branton are my sisters and we have talked about the case. I have talked to them about my evidence and they talked to me about theirs."

Mrs. Grizelle Howe:

"I knew Mr. and Mrs. McEnnery in their lifetime and had a conversation with Mrs. McEnnery regarding Maggie at my house, and she said Maggie was her adopted daughter; that she had it in writing; that they were to take her and educate her and give her what property they had at their death."

J. H. Long:

"I knew Mr. and Mrs. James Newman in their lifetime, near Dayton, Washington. They came there in 1870, then went to California, and returned to the vicinity of Dayton in the fall of 1871, or spring of 1872. Mrs. Newman was my father's sister. They had this little girl with them when they arrived near Dayton. They later let Mr. William McEnnery have this girl. Their reason for doing so was that their little boy treated her mean and disagreeably and they could not get along together."

Hilda Rauch:

"I knew Mr. and Mrs. Newman when they resided near Dayton. Mrs. Newman was my father's sister. They said they wanted a little girl as a companion for the little boy, and they had this little girl when they returned to the vicinity of Dayton. They later let Mr. William McEnnery take her to raise. They said the children did not get along well together and thought she would have a better home with McEnnerys. The McEnnerys were to take her and raise her as their own and provide for her. Mr. and Mrs. James Newman are dead."

Other witnesses, acquaintances of long standing, were offered by respondent. William Buckley knew Mr. McEnnery in 1878. He was a near neighbor and visited back and forth. He heard the McEnnerys say that Maggie was their adopted daughter.

"They did not have any evidence of the adoption that I know of. They just said that she was their adopted daughter, and told me they got her some place over near Dayton. I never heard them say anything about their property, or that Maggie would receive it when they were dead and gone."

George Watson knew the McEnnerys in 1878, when he worked for them for about a year. He says that McEnnery told him that he had adopted the girl; that he had papers drawn up and

"that the papers bound this girl to them as their adopted daughter. They stated she was their heir and would inherit their property. I never saw any papers. Mr. McEnnery said she was to have the property when he got through with it, and I think it was Mrs. McEnnery told me he gave \$20 for her."

J. E. Tupper says:

"I had a talk with Mr. McEnnery about Maggie. He spoke of her occasionally as his adopted daughter. I asked him why he was putting up so much house for himself and his wife, with no children, and he said his adopted daughter would have it. That was while I was working on the house. He didn't distinctly mention any writings, but said the lawyers would take care that his adopted daughter got his property."

Frank McBrierty heard the McEnnerys speak of respondent when they were living on the ranch on the Pataha.

"McEnnery said he got this girl and adopted her and was going to give her an education and raise her as his own; that they had all the papers drawn up. I don't recollect him saying anything as to whether

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Maggie would receive his property when he was gone."

But these conversations cannot be held to prove the terms of a written agreement entered into so long ago. They tend to prove nothing more than an attempted adoption, which we have found cannot be sustained in law.

"But the question whether relief should be granted or denied in a particular case addresses itself peculiarly to the conscience of the chancellor; and, before a plaintiff entitles himself to it, many considerations enter and are to be weighed . . . Where a contract such as this, resting in parol, and sought to be enforced after the death of the other party to it, comes before a court of equity for review, it is scrutinized with particular care, and only upon a satisfactory showing that it is definite and certain and just will it be enforced. The proofs of the contract should be clear, and the acts of the claimant referable alone to the contract." *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369.

Keeping in mind that the action is upon a contract said to have been in writing, and that the right of respondent, if any, grows out of the written contract and not out of the relation of adoption, and that the terms of the contract must be supplied by oral testimony which must be clear and convincing, we are inclined to hold that the contract has not been established with that certainty that would warrant a court of equity in granting the relief prayed for.

Many of the witnesses were very young when the conversations which they attempt to detail were had, and when we consider that it is the habit of tradition in after years to take the form of spoken words; that the human mind cannot carry the exact spoken words of conversations had even on yesterday; that impressions, when put into words, generally voice the

feeling rather than the recollection of the witnesses, and that such testimony is the weakest known to the law, it would burden equity to the breaking point to exclude the contrary circumstances and the subsequent conduct of the parties and give ear only to alleged conversations repeated after forty to forty-five years.

“No species of testimony is more dangerous, or received with greater caution, than testimony to admissions in casual, loose or random conversations. The value of such testimony is infinitesimal when it is given after the lapse of years, or where the witness had no interest in the statements and no special motive for treasuring them up in his memory. ‘The fact really is,’ said Judge Fox of the United States District Court, ‘that not one time in ten does a witness testify directly from positive remembrance of the language as spoken, but he clothes in his own words the idea which he then has of what he heard. It is seldom that a casual conversation is fixed so indelibly in our memory that we can repeat it verbatim months or years afterward; and I confess my suspicions are excited when I so frequently hear witnesses pretend so to do.’ Citing *In re Gould*, Fed. Cas. No. 5,604.” Moore, Facts, § 874.

“Alleged oral contracts to devise property have become so frequent in recent years as to cause alarm, and the courts have grown conservative as to the nature of the evidence required to establish them to the detriment and disinheriting of lawful heirs who otherwise would be entitled to the estate, and in enforcing them by specific performance when established. ‘Such contracts are easily fabricated and hard to disprove, because the sole contracting party on one side is always dead when the question arises,’ said the New York Court of Appeals. ‘They are the natural resort of unscrupulous persons who wish to despoil the estates of decedents.’

“While such contracts are sometimes enforced by the courts, it is only when they have been established by evidence so strong and clear as to leave no doubt

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and when the result of enforcing them would not be inequitable or unjust . . . Such contracts are dangerous. They threaten the security of estates, and throw doubt upon the power of a man to do what he wills with his own. The savings of a lifetime may be taken away from his heirs by the testimony of witnesses who speak under the strongest bias and the greatest temptation, with all the dangers which, as experience shows, surround such evidence." *Id.*, § 47, citing *Hamlin v. Stevens*, 177 N. Y. 39, 69 N. E. 118.

"An oral declaration by the testator that he intended the plaintiff to have all his property, and the fact that the latter, who was his child, lived with him and rendered such services as are usually rendered by children when members of their father's family, are not enough." Underhill, Wills, § 292.

See, also, *Cessna v. Miller*, 85 Iowa 725, 51 N. W. 50; *Hamlin v. Stevens*, 117 N. Y. 39, 69 N. E. 118; *Haubrich v. Haubrich*, 118 Minn. 394, 136 N. W. 1025.

The case of *Holmes v. Connable*, 111 Iowa 298, 82 N. W. 780, seems to us to be very much the same on the facts and to the point in law. The court said:

"Before going into details, we wish, as already suggested, to say something as to the rules that should govern courts in passing upon cases of this kind. It will not do, as plaintiff's counsel seem to think proper, to hold that because a certain number of witnesses have testified to the making of the contract, and none have been called to deny it, plaintiff's case is established. The lips of the only two witnesses who could deny it are forever closed. The only person who could controvert the admissions alleged to have been made is the dead man against whose estate this claim is produced. There is no defense that can be made, save as it may be found in the improbability of the stories of the plaintiff's witnesses, when tested by comparison with other evidence in the case, or the ordinary rules of human conduct under similar circumstances."

In that case, as in this, a contract to give a share of the estate was relied on. Witnesses deposed that the

deceased person had stated that he intended to make the plaintiff an heir of his property the same as his other children; that "she knows and you know I promised to make her share equally with my children", and similar expressions. The court said:

"But, if we accord all honesty of purpose to such witnesses, it must be remembered that these are admissions made in random conversations. This court has said: 'Than this, no species of testimony is more dangerous, or received with greater caution'."

The strongest testimony in respondent's behalf is that of the witness Owsley. It most nearly concurred in point of time. According to this witness, McEnnery

"wanted the papers made up so she would be his child legally *and would look after them when they got old.* . . . He said Newman had adopted the child in California out of an orphans home. He said he had agreed to take the child and raise her and give her a good education, and when he died she would heir their property. . . . After she went to school, he told me he had sent her there to give her a good education to take care of them and their property and to be obedient."

But when this testimony is considered in connection with the testimony of other witnesses, which amounts to nothing more than words of expectation, it weakens, rather than strengthens, the case of respondent, for we find here terms and conditions that contradict the bold reliance of respondent. The motive of the contract was that respondent should care for the McEnnerys in their old age, and would receive an education "to take care of them and their property."

The witness Long, who was seventeen years of age in 1872, and a relative of the Newmans, and who talked with them about the child and the engagement of the McEnnerys, says nothing about a promise to leave

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their property to respondent. In the testimony we find the motive of the Newmans. He says:

"They had this girl with them when they arrived near Dayton. They later let Mr. William McEnnery have this girl. Their reason for doing so was that their little boy treated her mean and disagreeably and they could not get along together."

When respondent married at about the age of 17, she, to all intents and purposes, passed out of the lives of the McEnnerys. She never saw them again, nor are we convinced that she ever had any correspondence with them. If so, it was at long intervals. The two or three letters offered as the letters of Mary McEnnery make no reference to a contract to leave her property to respondent. In *Holmes v. Connable, supra*, a mutilated letter, which was claimed to have made particular reference to a promise to will property, was rejected as suspicious, although it was quite as well sustained as the letters before us.

There is no testimony that presents were ever exchanged, or any words of greeting, on those occasions when the interest and affection of those who have interest and affection is prompted to manifest itself in deeds or words. There is no testimony that the children of respondent were ever brought in contact by letter or otherwise with the alleged foster parents. The record is void of all the courtesies and kindnesses that ordinarily attend the lives of those who have a mutual interest the one in the other. The want of these things, standing alone, may mean nothing, but they give emphasis to the improbability that the McEnnerys were reasserting a contract twenty and thirty years after the one claiming an adoption had passed out of their lives. If they were mindful of a contract to leave their property to respondent, is it not more

likely that they would have kept in touch with respondent as if she were indeed their daughter, and that their letters would have betrayed their intention. Instead, we are asked to decree performance of a contract upon an attempted proof of but one of its terms, and to presume that the service of seven years of infancy and dependence was the entire consideration for the promise.

That the McEnnerys did not bear in mind any contract to "leave" their property to respondent is evidenced by the fact that they executed mutual wills as late as the year 1900, in which they left all of their property the one to the other. Although, if any weight is to be given the letters which were introduced and which respondent says she received from Mrs. McEnnery, the old lady bore her the utmost good will, taking an interest in her family and personal affairs. Neither did the McEnnerys say anything of an adopted child, or a contract to leave their property to respondent, to the lawyer who drew the wills.

There is another bit of contradictory evidence, wholly negative it is true, but to be considered for what it is worth. It is an old note book which William McEnnery had as early as 1850, and in which he had entered some of the more important transactions of his life; his marriage, the death of relatives and friends, the purchase of land, etc., but no mention is made of any adoption or of a contract to leave his property to any one.

Respondent did not stand up well on cross-examination. She testified that she always called the McEnnerys father and mother, yet, when confronted by her own letters written when she was at the Sisters' school, she said that she called them father and mother until she went off to school, when Mrs. McEnnery

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asked her to call her "aunt". A most unlikely thing, for the sending of a child away to school would tend to a closer affection, rather than a relaxation of the sentiment which the one who was childless and who had been called mother must have theretofore entertained, if the respondent's testimony be true. She betrayed other weaknesses, but upon a phase of the case which we have felt needs no discussion at this time.

An equity will be raised where the one who is alleged to have made the promise is under some moral obligation to support or make the child an heir, as, for instance, if the child be an illegitimate son, or where the child is denied the expectancy that attaches to parenthood; but here the respondent did not give up anything, either actual or prospective. The Newmans, so far as the record goes, were under no obligation to leave her anything, and the record affirms, rather than denies, the supposition that they had any motive to insist that the consideration for the contract was the leaving of any property to the respondent. The only burden that attaches to them was care and custody, and the testimony that is clear and convincing goes no further than to disclose a disposition to relieve themselves of their burden and to put it upon the McEnnerys.

"The facts alleged in the amended complaint are not such as to serve as a basis for a very strong appeal to the sense of justice of a court of equity, on the theory that there was such a change of conditions and relations on the part of plaintiffs, made in reliance on any promise or promises of the Fischers, that it would be a fraud upon them not to give them the Fischer property. When originally taken by the Fischers, they were orphan children aged respectively eleven and fourteen years, without a single relative on earth so far as appears, and without any friend or home except such as was afforded them by the charitable

institution of which they were inmates. They could expect nothing therefrom except such care, support, and education as are ordinarily afforded by such an institution, until such time as they might be placed in some family under such terms as the Fischers agreed to with the authorities of the institution. It is not to be assumed that they would have fared better in any other family than they did with the Fischers. They were furnished by the Fischers with a home until their respective marriages. So far as appears, they gave up and sacrificed absolutely nothing in the way of present or prospective advantage by remaining with the Fischers." *Baumann v. Kusian*, 164 Cal. 582, 129 Pac. 986, 44 L. R. A. (N. S.) 756.

We cannot review all the cases cited by counsel. It is enough to say that the court found, in each case relied on, that the contract had been proved by cogent and convincing evidence. It is the rule that each case of this kind must rest upon its own facts, and when this case is so considered, the proof is not convincing.

Reversed and remanded with directions to dismiss the suit.

MAIN, MACKINTOSH, MITCHELL, and TOLMAN, JJ.,
concur.

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Statement of Case.

[No. 14414. *En Banc*. February 7, 1919.]

ART HARRY, *Respondent*, v. NORTHERN PACIFIC
RAILWAY COMPANY, *Appellant*.¹

EVIDENCE (98)—ADMISSION—CONCLUSIVENESS—ESTOPPEL. In an action for personal injuries received when a hand-car left the tracks, plaintiff's evidence on cross-examination that he guessed the car was "four or five months old," is not an admission that it was in good condition, and does not estop him from showing that it was out of repair and in an unsafe condition.

MASTER AND SERVANT (90-92, 161)—INJURIES TO SERVANT—ASSUMPTION OF RISK. A railroad construction hand daily using and riding on a hand-car does not, as a matter of law, assume the risk if it is in bad repair.

EVIDENCE (214)—OPINIONS—FACTS FORMING BASIS OF. In an action for personal injuries, a statement by the roadmaster, making an inspection after an accident, "something the matter with the car," is inadmissible as the expression of an opinion, where it was not shown that he was advised as to the rate of speed or circumstances attending the accident.

SAME (53)—RES GESTAE—STATEMENTS AFTER ACCIDENT. A statement of a roadmaster inspecting a hand-car after an accident is not admissible as part of the *res gestae*.

SAME (94, 95)—ADMISSION AFTER TRANSACTION—BY AGENT. A statement of a roadmaster after inspection to determine the cause of an accident, is admissible as the admission of an agent against the interest of his principal.

MASTER AND SERVANT (135)—INJURIES TO SERVANT—DEFECTIVE HAND-CAR—EVIDENCE—ADMISSIBILITY. In an action for personal injuries, sustained when a hand-car jumped the track and was found with one wheel off, in which there was no evidence of any defect other than such as related to the wheels, evidence as to wiring any other part of the car is inadmissible unless connected with the cause of the accident.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered May 7, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an

¹Reported in 178 Pac. 465.

employee engaged in railroad construction work. Reversed.

Cannon & Ferris and *F. J. McKevitt*, for appellant.
Crandall, Williams & Crandall, for respondent.

MAIN, J.—Action for personal injuries tried to a jury, resulting in a verdict and judgment in favor of respondent. The facts are substantially as follows:

The respondent, an Armenian by birth, together with a number of his countrymen, were in the employ of the appellant as laborers in an extra gang engaged in repairing or raising a portion of the company's track near Erie, Washington. The camp where the men boarded and slept was located some two miles from the point where the work was being done, and the men went from the camp to their work and returned on hand-cars furnished by appellant. Respondent had been so employed about four months prior to the accident. On the day of the accident, respondent, with three of his countrymen, took a hand-car and proceeded from the place where the gang was at work towards Kennewick for the purpose of procuring groceries. There is a sharp dispute in the testimony as to whether they so acted upon the order of the foreman or against his expressed direction. The hand-car was the ordinary hand-propelled car such as is ordinarily in use. Respondent and the men who went with him all testified that they were going "Same fast as was going to work," when the hand-car jumped off the track and the injuries complained of were received. When he "woke up," respondent says the hand-car was some four or five feet in front of him; that the left hind wheel was off the car and lying about three or four feet back of him. Neither respondent nor any of his companions appears to have made

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an examination of the car or of the wheel to determine the cause of the accident. Respondent and his companions were taken to Pasco for medical treatment and from there to the company hospital at Tacoma, where respondent remained some twelve days receiving treatment for his injuries. Respondent testified that the hand-car was one of four or five in use by the extra gang, of which he was a member, and had been so in use during the time of his employment; that it was used indiscriminately by the men who composed the gang, and that he probably had ridden on that particular hand-car many times before the accident; that the car was three or four or five months old, but he does not attempt to say whether or not the car was defective in any particular prior to the accident, neither did any of the other men who were on the car at the time of the accident attempt to point out any defects in the car.

Over the objection of the appellant, the witness Dick was permitted to testify that he went to the scene of the accident after it occurred, and while he was there the roadmaster, who had come out from Pasco, measured the track and found the gauge of the track to be right, put the car on the track, replaced the wheel and moved it for testing purposes, and then made the statement: "Something the matter with the car." The witness Dick, also over objection, testified that certain parts of the car under the pump were fastened together with wire. He also testified that the car was old, that the meshes were worn, making the tread of the wheels too wide; that the bolts and nuts were loose and had been so for two or three months, and that he had noticed these defects every day. The material part of this testimony was denied by a considerable array of appellant's witnesses, or explained

in accordance with appellant's theory of the case. All testified that they could find nothing wrong with the car except that the left hind wheel was off, and that from the marks on the ground and the ties, in their opinion, the wheel came off after the car left the track. One of appellant's witnesses, the master mechanic, testified that the wheel could not come off while the car was on the track, and some of them testified that, from the marks on the ground, they were of the opinion that the speed of the car exceeded twelve miles an hour at the time it left the track, and also testified that, as the men were placed on the car at the time of the accident—two at the rear and two between the handles—the weight was brought too much to the rear of the car and would have a tendency to raise the front wheels, especially if the car was propelled at an excessive speed.

Appellant makes three principal contentions: First, that respondent, having testified that the car was but three to five months old, which would make it practically a new car, is bound by such testimony as much as though it were an allegation or admission in his complaint, and that no evidence should have been received to the effect that the car was old, worn or defective.

The trouble with this contention lies in the fact that respondent did not attempt to testify as to the condition of the car. True, he did say, in answer to a question on cross-examination, that it was "Four or five months old car, three or four months old car I guess." But this in no manner admitted that the car was necessarily in good condition, or estopped him from introducing other testimony to show that the car was out of repair and in an unsafe condition, and falls far short of bringing him within the rule for

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which appellant contends. Nor does it necessarily follow, because respondent testified that the hand-car was used every day by the gang, of which he was a member, in riding to and from the work (and he no doubt rode upon it many times), that he was bound, in the exercise of ordinary care, to know the condition of the car and, if in bad repair, that he assumed the risk. Neither his knowledge, skill or use of the car was such as to justify this court in saying that, as a matter of law, he assumed the risk, and the question was one for the jury to determine.

Second. Appellant complains of the admission of testimony as to what was said by the roadmaster as to the cause of the accident. It appears that, immediately upon the report of the accident being received, the roadmaster, with others, came out from Pasco (a distance of six miles) to investigate. It does not appear how the trip was made or just how long it took, but apparently they arrived at the scene of the accident at about the same time as the section foreman and others who had been at work only about two miles distant. According to the witness, after measuring the track to see if the gauge was right, they put the car on the track to test it, and the roadmaster said: "Something the matter with the car." We think this an expression of an opinion only, and inadmissible. The roadmaster was not present at the time of the accident; he was not in charge of the injured men, and if he had examined the car at all, he had done so only superficially. It is not claimed that he had been advised as to the speed as to which the car was traveling or the position of the men thereon at the time of the accident, or was so advised as to the facts as to enable him to express an opinion or authorize him to make an admission which would be binding upon his

principal. If the evidence was admitted upon the theory that it was a part of the *res gestae*, then we think it violates the rule laid down in *Henry v. Seattle Electric Co.*, 55 Wash. 444, 104 Pac. 776; and if admitted on the theory that it was the admission of an agent against the interest of his principal, then it violates the rule laid down in *Goodwin v. Stimson Mill Co.*, 95 Wash. 41, 163 Pac. 2, and *Caldwell Bros. & Co. v. Coast Coal Co.*, 58 Wash. 461, 108 Pac. 1075.

Third. Since the case must be reversed for this error, we may say for the guidance of the court on a new trial that, while the complaint alleges

“Said hand-car was old and worn and some parts of the running gear thereof (the exact parts plaintiff being unable to specify) were fastened and held together by wire . . .”

yet there was no testimony in the case from which the jury could have found that any defect in the car, other than such as related to the wheels or the manner or means by which the wheels were held in place, could have caused or contributed to the accident, and, therefore, testimony as to the wiring of any other part of the car was wholly valueless and might tend to prejudice the jury. Such evidence should have been admitted only upon condition that it be connected with the cause of the accident, and upon failure to so connect, it should have been withdrawn from the consideration of the jury.

The judgment will be reversed, with direction to grant a new trial.

CHADWICK, C. J., MOUNT, TOLMAN, MACKINTOSH, and PARKER, JJ., concur.

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[No. 14764. Department Two. February 7, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
FRANK MILLER, *Appellant*.¹

CRIMINAL LAW (250)—CREDIBILITY OF WITNESS—QUESTION FOR JURY. The credibility of the witnesses is for the jury.

WITNESSES (55)—COMPETENCY—INFORMATION ACQUIRED BY PHYSICIAN—CRIMINAL ACTIONS. A physician cannot testify in a criminal case as to information acquired in treating the accused, without his consent, under Rem. Code, § 1214, so providing as to civil actions, and Id., § 2152, providing that the rules of evidence in civil actions shall be, so far as practicable, applied in criminal prosecutions; notwithstanding Id., § 2147, providing that physicians shall be protected from testifying in criminal prosecutions, which merely protects the rights of the physician.

SAME (56)—WAIVER OF PRIVILEGE. The consent of the accused to testimony by a physician as to the nature of a disease for which he was treated is not shown by the testimony of other witnesses that accused had admitted having been afflicted with such disease; but the waiver must be made by the accused at the trial.

SAME (55)—COMPETENCY—INFORMATION ACQUIRED BY PHYSICIAN. Where a physician treated accused for a certain disease, it must be assumed that he acquired information of the disease at that time, and that it was necessary to enable him to give treatment, within Rem. Code, § 1214, disqualifying the physician from testifying as to information acquired in attending his patient.

HOLCOMB, J., dissents.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered November 23, 1917, upon a trial and conviction of a gross misdemeanor. Reversed.

G. G. Hannan and Reeves & Reeves, for appellant.
Burt J. Williams and N. A. Pearson, for respondent.

PARKER, J.—The defendant was charged with the commission of a gross misdemeanor, in that he took indecent liberties with the person of a girl under the

¹Reported in 178 Pac. 459.

age of eighteen years, in violation of Rem. Code, § 2442. Trial in the superior court, sitting with a jury, resulted in a verdict of guilty, upon which judgment was rendered, fining the defendant and sentencing him to imprisonment in the county jail, from which he has appealed to this court.

It is contended by counsel for appellant that the evidence was not sufficient to sustain the verdict and judgment, and that the trial court should have so decided as a matter of law, in accordance with motions timely made in that behalf. A careful review of the evidence convinces us that this contention has to do, in its last analysis, only with the credibility of witnesses, whose stories, if believed by the jury, were sufficient to support the conviction. It therefore seems quite plain to us that the trial court did not err in refusing to sustain the challenge to the evidence made by counsel for appellant.

It is next contended in appellant's behalf that the trial court erred to his prejudice in permitting a physician to testify, over the objection of his counsel, that appellant had the disease known as gonorrhoea, prior to and near the time of the alleged commission of the offense, the physician having acquired information of that fact in attending appellant as his patient and treating him for that disease. This testimony was introduced by the prosecution as tending to show that appellant had communicated that disease to the girl, there being other testimony tending to show that she had become afflicted with it about the time of the alleged commission of the offense. The physician was asked and answered, over the objection of counsel for appellant, as follows:

"Q. I will ask you doctor if you treated Frank Miller at that time? A. Yes, Miller came to me, and

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I treated him for gonorrhoea. I gave him two prescriptions. That is all I saw of him until he came in and paid me. Q. That was on the 21st day of June, 1917? A. Yes, sir."

The offense was committed, if at all, on about June 25, 1917. The objection to the receiving of this evidence was, in the trial court, and is here, rested by counsel for appellant upon the following provisions of our civil and criminal practice statutes:

"A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient." Rem. Code, § 1214.

"The rules of evidence in civil actions, so far as practicable, shall be applied to criminal prosecutions." Rem. Code, § 2152.

Counsel for the prosecution rely upon the following provisions of the criminal practice statute:

"Witnesses competent to testify in civil cases shall be competent in criminal prosecutions, but regular physicians or surgeons, clergymen or priests, shall be protected from testifying as to confessions, or information received from any defendant, by virtue of their profession and character. . . ." Rem. Code, § 2147.

It seems clear to us that the above quoted portion of Rem. Code, § 1214, prescribes a rule of evidence in civil cases which is made applicable to criminal prosecutions by Rem. Code, § 2152; unless, as argued by counsel for the prosecution, § 2147 evidences a legislative intent to the contrary. The argument seems to be that, since § 2147 of our criminal practice statute is an express provision protecting the physician from testifying as to the information received by virtue of his profession from his patient and makes no pro-

vision for the protection of the patient as to his physician testifying as to information so received, there is thereby evidenced a legislative intent to not make the rule of evidence prescribed by the above quoted portion of § 1214 applicable to criminal prosecutions. We cannot agree with this contention. It seems to us that §§ 1214 and 2147, Rem. Code, are intended to protect two different classes of persons, and are in no wise in conflict with each other. The former protects a patient from having his physician disclose upon the witness stand any information acquired in attending him as such patient which was necessary to enable the physician to prescribe for him; while the latter has reference to the protection of the physician only. That is, in so far as the patient's rights are concerned, he has the right of election under §§ 1214 and 2152 in both civil and criminal cases; and in so far as the physician's rights are concerned, he has the right of election under § 2147 in criminal cases. It seems to us highly improbable that the legislature would accord to a patient a higher degree of protection in civil actions than in criminal actions, that is, a higher degree of protection to his right of property than to his right of liberty. The policy of such statutes, of which there are many in other states similar to ours, manifestly is for the benefit of the patient, to the end that he may with safety freely disclose his ailments to a physician to the end that they be properly treated. We are of the opinion that the trial court fell into error in allowing the physician to testify as he did, over the objection of counsel for appellant.

Some contention is made by counsel for the prosecution that the privilege of appellant to prevent his physician from testifying was waived by appellant's voluntary disclosures to others that he was afflicted with

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the disease of gonorrhoea, near the time of the alleged commission of the offense. These alleged disclosures rested entirely upon the testimony of other witnesses, and not upon anything that appellant or his counsel said or did at the time of the trial. Even the testimony of these witnesses tends to show that appellant, in making his admissions to them, denied having the disease at the time of the alleged commission of the offense. However that may be, we think a patient's consent to his physician's testifying cannot be shown solely by the testimony of witnesses concerning the patient's previous admissions or disclosures. No decision has come to our attention holding that such is the law. It seems to us that the consent must be evidenced to the trial court by some word or act of the patient at the time of the trial, so that the trial court can conclusively know, without depending upon the veracity of third persons as witnesses, that the patient has waived the privilege accorded to him by the statute. We conclude, therefore, that the record does not properly show that appellant waived the privilege of having his physician refrain from testifying.

It is further argued that there is nothing in the physician's testimony which discloses any communication made by appellant to the physician, or information acquired by the physician, when he prescribed for appellant and treated him for the disease. It is true that there is nothing in the testimony of the physician indicating what conversation took place between him and appellant as his patient; but manifestly there is enough in his testimony to call for the conclusion that he acquired the information as to appellant being afflicted with the disease when appellant went to him for treatment. In *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185, 194, Judge Miller, speaking for the court,

made the following pertinent observations touching a similar contention:

“The point made that there was no evidence that the information asked for was essential to enable the physician to prescribe is not well taken, as it must be assumed from the relationship existing that the information would not have been imparted except for the purpose of aiding the physician in prescribing for the patient. Aside, however, from this, the statute in question, being remedial, should receive a liberal interpretation, and not be restricted by any technical rule. When it speaks of information it means not only communications received from the lips of the patient but such knowledge as may be acquired from the patient himself, from the statement of others who may surround him at the time, or from observations of his appearance and symptoms. Even if the patient could not speak, or his mental powers were so affected that he could not accurately state the nature of his disease, the astute medical observer would readily comprehend his condition. Information thus acquired is clearly within the scope and meaning of the statute.”

We are of the opinion that this record calls for the conclusion that the physician acquired the information as to which he testified when he treated appellant; that such information was necessary to enable him to treat appellant; and that the court erred to appellant's prejudice in permitting the physician to testify over the objection of his counsel.

Some contention is made by appellant's counsel that the court erred in giving and refusing to give certain instructions. We think there was no prejudicial error in this regard.

The judgment is reversed because of the error of the trial court in admitting the physician's testimony over the objection of counsel for appellant, and he is granted a new trial.

MOUNT, FULLERTON, and MAIN, JJ., concur.

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HOLCOMB, J. (dissenting).—The matter of privilege as to the testimony of a witness, whether on the part of the witness or of the party, is a matter of policy, generally declared by the legislature. At common law, privilege as to communication between physician and patient could not be invoked, while religious confessional privilege was recognized. By virtue of § 1214, subds. 3 and 4, *supra*, priests and clergymen and physicians are *disqualified* as witnesses as to communications made by confessors religiously and patients “necessarily” to their physician, upon the invocation of the privilege by confessor or patient in civil actions. This results in a disqualification of the witness by such invocation of privilege on the part of the interested party. The criminal statute recognizes the right of protection on the part of the same classes of witnesses, but does not in terms grant to the confessor or patient the right to object to the testimony or invoke the privilege. Consequently, unless the statute, § 2152, *supra*, prescribing that the rules of evidence in civil actions so far as practicable shall be applied to criminal prosecutions controls herein, such privilege cannot be invoked by the patient.

Statutory privilege as to testimony is not strictly a rule of evidence, but rather a rule of procedure and a grant of immunity. The great end and aim of judicial investigation is to elicit the exact and entire truth as to the matter under inquiry, so far as human limitations allow, and to declare the truth and embody it in a judicial determination. To that end it is sometimes the wise policy of the law, notwithstanding Professor Wigmore’s strictures thereon in his valuable work (Vol. 4, § 2380), to forbid or repress testimony that might be competent and relevant if offered by

competent witnesses under general rules relating thereto. For example, when the mouth of one party to a transaction is closed by death, it is the wise policy of the law to forbid the other party to that transaction to open his mouth in any adverse proceeding involving the transaction, since, inasmuch as the mouth of the one is closed, the testimony of the other might not be capable of contradiction, and the temptation to frail human nature to falsify, alter, or fabricate material facts is too great to permit the belief that the real truth might, in such cases, be discovered. Therefore, in such cases, it is wisdom to repress such uncontradictable testimony rather than to elicit it. Again, in regard to confidences between husband and wife, attorney and client, priest or clergyman and religious confessor, and physician and patient, the spirit of the law encourages the fullest and freest confidential disclosures, and in civil cases allows the party so disclosing his inner conscience to his trusted adviser, so recognized by law, to object and thereby prevent any public judicial disclosure thereof.

But to reiterate, these safeguards to private parties in civil litigation are not rules of evidence generally, but only special rules of procedure provided for the benefit of the parties. When another statute requires the rules of evidence, so far as applicable in civil proceedings, to apply to criminal proceedings, it has reference to the general principles and rules applying to evidence as such or the competency of witnesses generally, and not to statutory privileges or immunities.

A further consideration that has some weight is that, in criminal proceedings, when the object to be sought and, if possible, attained is to ascertain the truth or falsity of an accusation of offense against the laws and the peace and dignity of the state and

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determine the guilt or innocence of the party charged, the state, as a whole, is the party interested adversely, and in the broad interests of such purpose the state has the right to say what immunities and privileges shall be granted as against it.

Sections 1214, 2147 and 2152, Rem. Code, were originally passed by the territorial legislature in 1854, and were embodied in the Code of 1881. The Code of 1881 was a separate and independent enactment, and where any conflict arises between that code and prior statutes the last enactment must be held to be the law. In the Acts of 1854, the word "not" occurred before the word "protected" in the section now codified as § 2147, Rem. Code, but was somehow omitted in the Code of 1881. Section 2147, *supra*, gives the physician the right to claim the privilege, irrespective of whether the defendant claims it under §§ 1214 and 2152, *supra*. In the present case, the physician expressly waived the privilege and expressed his willingness to testify.

The defendant's objection to the physician's testimony relating to the treatment of appellant should have been sustained, if the same privilege is accorded to the patient of a physician in a criminal proceeding as in a civil case.

Since it apparently deliberately legislated upon the subject, prescribing the privilege of certain classes of witnesses as to necessary or confidential communications to them, it would appear that the legislature of 1881 intentionally declared the policy of the law as to proceedings brought by the state, by omitting the word "not" in the former statute and preserving the privilege only to the witness *to whom*, and not the party *by whom*, such facts had been communicated.

The statute relating to civil actions prohibits the testimony unless the patient consents, while the stat-

ute relating to criminal proceedings avoids prohibiting the testimony but protects the privileged witness upon his claim only.

There was therefore no error in permitting the physician, who waived the physician's privilege, to testify in a criminal case.

I therefore dissent.

[No. 14974. Department Two. February 7, 1919.]

CASCADE CONSTRUCTION COMPANY *et al.*, Respondents,
v. SNOHOMISH COUNTY *et al.*, Appellants.¹

APPEAL (40)—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY—AGGREGATED CLAIMS. In an action to establish the liability upon a bond to indemnify materialmen and laborers upon public work, in which judgment was given against certain claimants upon their cross-complaints, no appeal lies in the case of any cross-complainant whose claim was for less than the sum of \$200, that being the jurisdictional amount on appeal for the recovery of money.

COUNTIES (46) — HIGHWAYS (33) — CONTRACTS — CONTRACTOR'S BONDS—NOTICE—WAIVER. Where a subcontract on county highway work was not consented to and filed with the county commissioners as required by the principal contract, the subcontractor was merely the agent of the principal contractor for the purchase of supplies, and not a subcontractor within the meaning of Rem. Code, § 1159-1, requiring notice to the original contractor within ten days of furnishing of supplies to a subcontractor; failure to file the subcontract being a waiver by the original contractor of the right to such notice.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered April 25, 1918, in favor of the plaintiffs, in an action to determine the validity of claims against a fund due a contractor on public work, tried to the court. Reversed.

¹Reported in 178 Pac. 470.

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Opinion Per MOUNT, J.

Wm. A. Johnson, J. A. Coleman, and Williams & Davis, for appellants.

Shorett, McLaren & Shorett, for respondent Cascade Construction Company.

MOUNT, J.—This appeal is from a judgment of the lower court denying the appellants the right to have their claims satisfied from a fund in possession of Snohomish county. The facts are as follows: In April of 1917, Snohomish county was about to construct a paved highway between Stanwood and Florence in that county, the work being known as project No. 15. After calling for bids, a number of bids were received by the county. The Ryan Construction Company was the lowest bidder. The Cascade Construction Company was the next lowest bidder. The contract was awarded to the Ryan Construction Company. That company was unable to furnish a bond, as required by statute, and consented that the contract be made to the Cascade Construction Company. A contract was thereupon entered into between Snohomish county and the Cascade Construction Company for the work. This contract provided, among other things, as follows:

“The contractor shall not let, assign or transfer this contract or any interest therein, or sublet the work herein provided to be done, or any part thereof, without the consent of the board. The contractor shall file with the board a duplicate of all subcontracts made by him as aforesaid.”

Thereafter, the Cascade Construction Company entered into a contract with the Ryan Construction Company by which the Ryan Construction Company was to perform the contract. At the time the board of county commissioners entered into the contract with the Cascade Construction Company, that company, as

principal, and the United States Fidelity & Guaranty Company, as surety, gave a bond to the county for the faithful performance of the contract. This bond provided for the faithful performance of the contract by the Cascade Construction Company and all of the provisions of said contract and the payment of labor, material and provisions used in said work. The subcontract entered into between the Ryan Construction Company and the Cascade Construction Company, the original contractor, was reduced to writing but was never filed. The agent for the Cascade Construction Company testified that two of the board of county commissioners consented to the subcontract. Two of the board of county commissioners testified that no such consent was given. It is not claimed that the subcontract was filed as provided in the original contract.

During the progress of the work, these appellants and others furnished material which was used in the construction of the road. After the completion of the work, and within thirty days after the acceptance of the work by the board of county commissioners, these appellants filed claims against the bond and the fund to be paid by the county to the original contractor. The county withheld from the funds some \$4,883.47, payable under the contract to the Cascade Construction Company, and refused to pay the same until the rights of the claimants were determined. Thereupon the Cascade Construction Company and the United States Fidelity & Guaranty Company brought this action in the superior court for Snohomish county, praying that the county be required to pay the money which was due upon the contract into court and that all claimants who had filed claims against the bond be required to present their claims;

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that such claims as were valid be paid and others rejected; and that, after payment of the valid claims, any surplus of the fund should be paid to the Cascade Construction Company. The appellants and the other creditors appeared in the action and pleaded by way of cross-complaint that they had furnished materials which had been used in the work; that they had each given notice to the county, within thirty days after completion of the work, that they had furnished the materials; and prayed that their respective claims be paid out of the fund, and that for any deficiency they have judgment against the Cascade Construction Company. Upon issues joined, the case was tried to the court. Some of the claims were allowed and others were rejected. This appeal followed.

The respondents have moved to dismiss the appeal for several reasons. We find no merit in any of the reasons except one, to the effect that the claims of a number of these appellants are less than \$200. In the case of *National Surety Co. v. Bratnaber Lumber Co.*, 67 Wash. 601, 122 Pac. 337, we had occasion to consider the question here presented, and there held that this court had no jurisdiction where the amount of claims of the character here in question was less than \$200. Upon the strength of that case, the motion must be sustained as to the appellant Gustaf Nicklason, whose claim is for \$89.60; Tuttle & Nicklason, whose claim amounts to \$185.41; Nordeen Foundry Company, whose claim is \$147.75; and Peoples Union, whose claim is \$47.15. This leaves for consideration the claims of the Agnew Hardware Company and the Nicklason Auto Company, whose claims amount to more than \$200.

As we understand the record of the case, the lower court denied a recovery because the work upon the road

was done by a subcontractor and because the claimants had not given ten days' notice, as required by Rem. Code, § 1159-1, to the original contractor after the first delivery of materials, supplies or provisions furnished to the subcontractor. It is conceded that this notice was not given; that the only notice given was the notice given after the completion of the work and within thirty days after the acceptance thereof by the board of county commissioners; so that the main question in the case is whether the Ryan Construction Company, which did the work, was a subcontractor, and whether the persons furnishing supplies, material or provisions were bound to give notice to the original contractor within ten days after furnishing such supplies. The respondent relies upon the case of *Crane Co. v. Maryland Casualty Co.*, 102 Wash. 59, 172 Pac. 866. In that case the Beers Building Company, as contractor, had entered into a contract with the state for the construction of a building. The Maryland Casualty Company became surety upon that contract. The contract there provided:

"The contractor shall not assign this contract nor sublet any portion thereof without the written consent of the board of control and the bonding company."

A subcontract was entered into between the Beers Building Company and Musgrave and Blake. Musgrave and Blake bought materials from the Crane Company and neglected to pay therefor. The Crane Company thereupon brought an action against the surety company and Musgrave and Blake and a recovery was permitted. The board of control had not consented to a subletting of that contract. We there said:

"There was no effectual assignment or subletting of the original contract in this sense, because the subcontract was not consented to by either the state or

the casualty company, and besides, it seems quite apparent to us that there was no intention on the part of Beers Building Company and Musgrave and Blake that there should be any assignment or subcontract in this sense. This seems plain from a casual reading of the subcontract entered into between them. The state, as contemplated by the terms of this contract, was to pay Beers Building Company, and that company was to pay its subcontractors, Musgrave and Blake, just as it would pay laborers or materialmen. It is equally plain that the state never regarded this contract in any other light. The board of control continued at all times to look to Beers Building Company for the completion of its contract, until its rights thereunder became forfeited and were put an end to by the board of control because of its failure to perform its contract. We conclude, therefore, that Musgrave and Blake were never intended to become, and never did become, subcontractors within the meaning of the above quoted provision in the original contract between Beers Building Company and the state, prohibiting the assigning and subletting of that contract by Beers Building Company without consent of the board of control and the bonding company."

The court then further said:

"We are equally well satisfied that Musgrave and Blake did become, and were intended by all parties to become, subcontractors within the meaning of the bond and the statute in pursuance of which it was executed, and that Musgrave and Blake thereby became in legal effect the agents of Beers Building Company for the purchase of plumbing supplies for the carrying on of the work, in pursuance of which agency they purchased the material from Crane Company."

The respondent insists that this latter quotation is controlling upon the facts in this appeal; but what was meant there was that, so far as the original contractor and the surety upon that contract were concerned, Musgrave and Blake were agents of the original con-

tractor for the purpose of purchasing supplies used in the building. There was no question of notice in that case, and the use of the word "subcontractors" was to denote agency, as the whole context indicates. In so far as these claimants are concerned, under the facts in this appeal, the subcontract as to them was of no force. The provision in the original contract that the contractor shall not let, assign or sublet the work provided to be done, or any part thereof, without the consent of the board, and that the contractor shall file with the board a duplicate of all contracts made by him as aforesaid, was for the protection not only of the board itself, but of all persons who furnished supplies, material and provisions for the work to be done; and since that contract was not filed with the board as the original contract required, it gave no notice to persons furnishing material or supplies that they were not furnishing such supplies for the original contractor, whose contract was on file.

When the original contractor fails to file his subcontract he thereby waives the right to the notice required by Rem. Code, § 1159-1. The lower court found that there was a subcontract and that it was consented to by two members of the board. There was no evidence that the board made any record of such consent, and the fact is that no such record was made and the subcontract was not filed with the board. In order to employ subcontractors to do the work and to relieve the original contractors from liabilities for claims for materials, supplies, etc., furnished the subcontractor, it is the duty of the original contractor to file the subcontract with the board upon their consent. The object of this, as we have already stated, is to give notice to persons who may furnish materials, etc., for the work. We are satisfied, therefore, that the trial

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Statement of Case.

court should have concluded that, as between the claimants and the original contractors and the surety company, there was no subletting of the work, because the subcontract was not filed as required by the contract. It was, therefore, not necessary for these claimants to serve a notice upon the original contractor within ten days after the date of the first delivery of materials, but a notice within thirty days after the acceptance of the work was sufficient.

The judgment appealed from is reversed as to the appellants who have not been dismissed, and the cause remanded with instructions to the lower court to enter a judgment in their favor for the amounts claimed.

MAIN, FULLERTON, PARKER, and HOLCOMB, JJ., concur.

[No. 14993. Department Two. February 7, 1919.]

J. E. YODER, *Appellant*, v. EDITH YODER, *Respondent*.¹

DIVORCE (67)—SUIT MONEY—DISCRETION. Where a husband worth a million dollars makes defamatory accusations in an action for divorce, entailing great expense in procuring evidence in and out of the state, a temporary allowance of \$3,000 for attorney's fees and \$1,500 for suit money, is not an abuse of discretion.

SAME (56)—FEES AND COSTS—PAYMENT—RIGHTS OF ATTORNEYS ON SETTLEMENT. After the allowance of temporary alimony and suit money in an action by a husband for a divorce, and the filing of a claim for a lien thereon by the wife's attorneys, who had agreed to conduct the defense for the sums allowed by the court, the attorneys cannot be discharged without payment and the action dismissed through a voluntary settlement; but the attorneys are entitled to enforce the judgment for attorney's fees and suit money, and to have execution therefor under the judgment, upon ascertainment of the amount due by the trial court.

Appeal from an order of the superior court for Stevens county, Neal, J., entered September 4, 1918,

¹Reported in 178 Pac. 474.

allowing alimony and suit money, in an action for divorce; also motion to vacate the order appealed from on the ground of a voluntary settlement of the action. Order affirmed; motion denied.

F. M. Turner and *W. W. Zent*, for appellant.

Turner, Nuzum & Nuzum, for respondent.

HOLCOMB, J.—Appellant, on August 7, 1918, filed his complaint in the superior court against respondent, praying for a divorce, alleging two statutory grounds in two separate causes of action. August 27, 1918, respondent filed her answer, admitting the marriage, denying the grounds alleged for a divorce *in toto* and in detail, prayed for the dismissal of the action, and at the same time filed her motion, supported by affidavits, for temporary alimony, suit money and attorney's fees, to all of which appellant replied. This motion being heard by the court on August 28, 1918, on the pleadings, affidavits and counter-affidavits, the trial court made and entered an order allowing temporary alimony in the sum of two hundred dollars per month from August 1, 1918, the first month's installment to be paid instanter, and thereafter on the first day of each month; fifteen hundred dollars suit money to be paid to respondent's attorneys or into the registry of the court on September 3, 1918, and to be disbursed by them in preparing her defense; and the sum of three thousand dollars attorney's fees to be paid into the registry of the court or to respondent's attorneys or their order on September 3, 1918. The court reserved the power to make other and further allowances for suit money and attorney's fees, either *pendente lite* or at the final hearing, as justice might require. From this order, appellant forthwith ap-

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pealed, and gave his appeal and supersedeas bonds in the sum fixed by the court.

The cause pending here on appeal and a notice to dismiss the appeal, was set to be heard on December 17, 1918. On December 9, 1918, respondent made her affidavit to the effect that she and her husband, the appellant, had voluntarily settled, compromised and adjusted all their differences, resumed their marital relations, were again living together as man and wife, and that she had so notified her attorneys, Messrs. Turner, Nuzum & Nuzum, in writing, on December 9, 1918, and dismissed them as her attorneys and notified them not to appear further in her behalf; that she "is ready, able and willing to settle with her attorneys for all compensation due them for services rendered her in said cause," etc., etc. Appellant's attorneys presented their motion to vacate, set aside and hold for naught the order of the lower court appealed from, upon the day of the hearing, and supported the same by the affidavit above mentioned of respondent, and affidavit of appellant to the effect that the parties had voluntarily and amicably settled, adjusted and compromised all their differences involved in the action and resumed the relations of husband and wife. A written consent signed by respondent was also filed at the same time "consenting and stipulating that the motion of appellant to vacate and set aside the order appealed from may be granted" by this court, and counsel for appellant also suggest that the entire controversy is limited by the fact that this or the lower court has no jurisdiction further than to vacate and set aside the order complained of, although not abandoning the appeal on the merits. They also earnestly insist that the attorneys who represented respondent have been discharged and have no status before the court.

On December 5, 1918, prior to notice of discharge, Messrs. Turner, Nuzum & Nuzum filed in the superior court where the cause was brought a written notice and claim of lien as attorneys for their fees in the proceeding, upon all funds ordered to be paid into the registry of the court under the order of August 28, "by virtue of services rendered under special agreement with defendant and whereby they were to receive as compensation from her as attorneys in the action all sums which the court should allow as attorney's fees, either on the preliminary order or on final decree, and which they were to accept as their compensation." No part of the attorney's fees or suit money has been paid to the attorneys who represented respondent, or into court for them.

The situation now is that both appellant and respondent are asking the reversal, or the annulment, of the order appealed from, without first satisfying respondent's attorneys of record, and respondent, in effect, asks that result through the attorneys for appellant. While she has made affidavit that she is "ready, able and willing to pay all compensation due the attorneys" who represented her, she has not done so; and she, while they duly represented her under proper authority, invoked the jurisdiction of the court having the subject-matter in its jurisdiction to compel the payment of her attorneys for their services pending the litigation, in part, and for the expense of her defense, out of the property of the plaintiff, her husband. In so proceeding and in support of her application, she made affidavit that she had no money or means, but was penniless and wholly unable to provide suit money for attorney's fees, while her husband was possessed of property of the value of a million dollars or more.

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The allegations against respondent were very defamatory, and she made a very strong showing in support of her application that she was wholly innocent of the charges; that her husband was the dupe of business associates and of a conspiracy, of which she was being made the victim; that her defense was in good faith; that she desired no divorce, but desired reconciliation with her husband and the resumption of the marriage relations; and that her proper defense would entail very great expense and the procuring of evidence over a vast stretch of territory in and out of this state, and that \$10,000 would be a reasonable sum to allow her attorneys and for suit money, preliminarily. At the hearing on the application, there were several affidavits and counter-affidavits presented to the trial court, and upon the pleadings and the showing made we are quite convinced that there was no abuse of judicial discretion on the part of the trial court in making the preliminary order for allowances to respondent for temporary alimony, suit money and attorney's fees. We are obliged so to decide on the merits of the appeal in determining that alone. We are now confronted with the question whether the attorneys who represented respondent can now enforce that order. We are ever ready to encourage the amicable settlement of litigation, more especially of divorce suits. We believe it to be the duty, both of trial courts and appellate courts, to lay no straw in the way of the reconciliation of estranged spouses at any stage of the proceedings. But we do not believe that by such voluntary act of the estranged parties to a divorce suit they can so summarily and without consideration dispose of counsel who, in good faith, performed very valuable services and expended money in behalf of the wife, who is peculiarly protected in such cases by our law.

It is asserted that our decision in *Hillman v. Hillman*, 42 Wash. 595, 85 Pac. 61, 114 Am. St. 135, is authority for the contention that the attorneys who represented respondent have now no standing as such in this proceeding to have their attorney's fees settled, but that such fees must be adjusted in actions brought for that purpose. The situation in that case, however, differed from the situation here, in that while an application on behalf of the wife for suit money and attorney's fees, preliminary, was pending but no order made, the parties voluntarily composed their differences and the wife, individually, stipulated to dismiss her action. When the stipulation was presented to the court for action, her attorneys appeared and opposed dismissal on the ground that they had an interest in the action to the extent of their attorney's fees, and that the parties were powerless to dismiss the action without their consent. The trial court took their view of the matter and allowed them to intervene for their costs and fees and ordered a hearing, which resulted in findings as to the amount and value of their expenses and services as attorneys and judgment therefor in their favor. True, it was observed in that case that:

"The measure and mode of compensation of attorneys are, under our statute a matter for private agreement between client and attorney (Bal. Code, § 5165) and . . . actions for divorce, therefore, which both parties desire dismissed, should not be kept alive merely to settle the claims of counsel for attorney's fees."

In the present case, the attorneys for the wife have not "intervened." They have already a valid order or judgment for the payment to them of their partial attorney's fees and suit money. Appellant brought respondent into court at his suit and she was compelled

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to employ attorneys for defense to clear her name of the charges brought against her and to resist the granting of a divorce. The law encourages the thorough defense of all divorce actions. The statute (Rem. Code, § 988), empowers the trial court to make such preliminary order to "insure to the wife an efficient preparation of her case, and a fair and impartial trial thereof," which is no more than was ordered in this case. This statutory provision has many times been invoked and invariably sustained. True, as we held in *Zent v. Sullivan*, 47 Wash. 315, 91 Pac. 1088, 13 L. R. A. (N. S.) 244, and in *Humphries v. Cooper*, 55 Wash. 376, 104 Pac. 606, 133 Am. St. 1036, that:

"In view of the liberal provisions of this statute (*supra*) we see no possible reason why the wife is under a necessity to pledge her husband's credit for the expense of prosecuting or defending an action for divorce in this state, or why she should have any implied power in that regard."

She did not pledge her husband's credit. The law was invoked to render him liable, and the court adjudged him liable. Here the liability of the husband is already fixed and the rights of the attorneys already, to that extent, fixed and acquired. Until reversed, that preliminary liability is final, and we held in *State ex rel. Surry v. Superior Court*, 74 Wash. 689, 134 Pac. 178, that such an order for temporary alimony, suit money and preliminary attorney's fees is a final judgment and appealable as such. This being true, and believing the order assailed was well within the discretion of the trial court under the issues and facts presented, we cannot allow the contention of appellant that the attorneys for respondent, upon the cessation of the controversy, have no right to enforce the payment of their attorney's fees and suit money under the order. The sum awarded the wife in a divorce action

as an attorney's fee is not hers, but her attorneys'. The allowance was made to her for the use and benefit of her attorneys. While the judgment stands in her name, she is a dry trustee without power to satisfy the judgment until her attorneys have been satisfied. The allowance for suit money stands upon the same footing by virtue of the terms of the order or judgment, but only to the extent of their actual necessary expenses in the "efficient preparation of her defense, in order to secure a fair and impartial trial."

The reconciliation incontestably terminates the divorce action and the allowance for temporary alimony falls therewith, as also any unexpended balance of the suit money. Nor can the attorneys now recover any other compensation unless by private and separate recovery from the wife (*Zent v. Sullivan, supra*), and are probably estopped therefrom by the force and effect of their affidavits in support of the motion for attorney's fees *pendente lite* and their notice of lien claim. But to the extent of the allowance fixed, the same is presumed to be earned, unless the court exceeded a just discretion in making the order, which we cannot find. "The laborer is worthy of his hire," even though an attorney.

The motion to vacate, set aside and annul the order is denied; the order appealed from is affirmed.

It is probably proper to determine how the remainder of the allowance should be adjusted by the trial court in view of the present situation of the parties and status of the case. The temporary alimony allowance will, of course, be remitted. Within ten days from the filing of the remittitur from this court in the superior court, the attorneys who represented respondent may file their verified cost bill of all necessary and proper expenditures paid out in preparing her case for

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trial, which may be moved against by appellant in the usual statutory manner. The lower court may then examine the cost bill and showing made resisting the same and make an order in the premises as the law and facts may dictate. A further order may then be made for the payment of such suit money as may be found due and payable, which, together with the allowance of attorney's fees, shall be paid to the attorneys who represented respondent, or their order, and execution or personal attachment may be had therefor, as provided by Rem. Code, § 988. Costs are allowed to respondent or the attorneys who represented her, according to who paid them, as may duly appear.

MAIN, FULLEBTON, MOUNT, and PARKER, JJ., concur.

[No. 14860. Department Two. February 11, 1919.]

EDNA C. HAMPSON *et al.*, Appellants, v. D. K. WELT,
Respondent, L. V. WELLS *et al.*, Defendants.¹

APPEAL (397)—PRESUMPTIONS—FINDINGS. Where the record on appeal fails to incorporate the evidence of the recording and indexing of a contract for the sale of land, as to which the appellants had the burden of proof, the findings of the trial court on such issue must be presumed to be correct.

Appeal from a judgment of the superior court for Douglas county, Hill, J., entered February 7, 1918, in favor of one defendant, in an action for equitable relief, tried to the court. Affirmed.

Eugene D. Clough and *P. D. Smith*, for appellants.
Wright, Kelleher & Allen, for respondent.

PARKER, J.—This is an action to enforce a claimed vendee's lien upon land in Douglas county; that is,

¹Reported in 178 Pac. 469.

to recover that portion of the purchase price which had been paid by plaintiffs, the Hampsons, to the defendants Wells and wife, upon a contract entered into between them for the sale of the land, and to have such recovery adjudged a lien upon the land, and that it be foreclosed as against defendant Welt, who became vested with the title thereto through the foreclosure of a mortgage thereon, executed and delivered to him by defendants Wells and wife after the execution of the contract of sale. Trial in the superior court for Douglas county resulted in a decree awarding recovery of a personal judgment against the defendants Wells and wife for the amount paid by the plaintiffs upon the purchase price, denying foreclosure of the claimed lien upon the land as against the defendant Welt, and decreeing him to be the owner of the land, free from the claim of lien. From this disposition of the case, the plaintiffs have appealed to this court, the controversy here resolving itself into one between the plaintiffs Hampson and the defendant Welt.

It is conceded that Welt had no actual knowledge of the existence of the sale contract between Wells and wife and the Hampsons until long after the giving of the mortgage to him by Wells and wife, under the foreclosure of which he acquired title to the land. Whether or not he had constructive notice of the sale contract when he received the mortgage we think becomes of primary importance here, since it must, in any event, first affirmatively appear in the record before us that there was then such record of the sale contract in the auditor's office of Douglas county as to impart constructive notice to Welt before we could say that the trial court's disposition of the case upon the merits was erroneous, no matter how we might view the other question, to wit, the question of the Hampsons waiv-

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ing their claimed vendee's lien by the taking of other security at the time of entering into the sale contract.

We have before us a statement of facts, duly certified by the trial judge as containing "all the evidence both oral and written offered and received in this cause." There is no exhibit read into the statement of facts, attached thereto, or referred to therein as such, purporting to be a copy of, or having the slightest reference to, the sale contract as being recorded or indexed in the auditor's office. There is not a word, either in the body of the statement of facts, or any exhibit made a part thereof, touching the question of the recording or indexing of the sale contract, other than the following:

"Mr. Clough: Plaintiffs wish to offer in evidence the record, page 252, Volume 2, of the Land Contracts of Douglas county.

"Mr. Wright: Defendants object to that, your Honor, for the reason that it is not accompanied by any showing of how this contract was indexed, and we claim the indexing is an essential part of the record in the auditor's office. This contract, as indexed, doesn't contain any description whatever of the property. Defendants object that the indexing is defective in that it does not show any description of the land or reference to the land. Objection overruled.

"Mr. Clough: I offer to submit that page of the record, and Mr. Wright insists that it is not admissible on account of the defect. If he wishes that to be considered he will have to show what the index is. I am willing to have it all go in together if he wishes.

"The Court: That offer will be accepted. The objection overruled, in view of the statement of counsel for plaintiff that the record shown on page 252, Volume 2 of Land Contracts in the auditor's office, together with the index to the page in question, be included in the offer."

Now, manifestly this statement of facts, while evidencing some talk seeming to state an offer of documentary proof, does not show the production there of

the documentary proof so offered; at least not so that we, having only the cold typewritten record before us, can know what such offered proof was. Indeed, this record does not suggest, other than by uncertain inference, that the trial court saw the offered documentary proof. But even if the trial court did see it, since it is not made a part of the statement of facts by exhibit or otherwise, we must proceed upon the theory that it was not such as to call for a decree other than such as the trial court rendered.

The trial court made no findings whatever touching Welt's rights, other than reciting in the decree that "the equities are with the defendant Welt as against the plaintiffs." This is all we know of the ground upon which the trial court rested its decree denying foreclosure of the claimed lien of appellants as against Welt. Therefore, since whether or not the contract was recorded in the auditor's office so as to impart constructive notice became a question of fact upon the trial as to which the burden of proof rested upon appellants, since we have no proof in this record upon that question, and since we must indulge in the presumption that the trial court's disposition of the case upon the merits was correct, especially in view of its findings as to the equities, there is, we think, no other course open to us but to affirm the decree. It is so ordered.

MOUNT, MAIN, FULLERTON, and HOLCOMB, JJ., concur.

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[No. 14865. Department Two. February 11, 1919.]

FLORENCE-RAE COPPER COMPANY, *Appellant*, v. IOWA MINING COMPANY, *Respondent*.¹

ESTOPPEL (18, 54)—MINING CLAIMS—PERMITTING IMPROVEMENTS. A mining company, holding only an inchoate title and right to the possession of mining claims, susceptible to abandonment, is estopped to assert title where it had knowledge at the time of an attempted relocation and stood by two years while the relocators expended a large amount of money in development and disclosed a body of ore, and made no claim until the first car of ore was shipped.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered November 7, 1917, upon findings in favor of the defendant, in an action for equitable relief, tried to the court. Affirmed.

E. H. Guie, Earl Husted, and J. A. Guie, for appellant.

Carkeek, McDonald, Harris & Coryell, for respondent.

MAIN, J.—The parties to this action are rival claimants to the possessory right to four mining claims and mill sites, which will be referred to simply as four claims. The plaintiff claims either by original location or through the original locators. The defendant claims through an attempted relocation. The trial resulted in denying the relief asked for by the plaintiff and sustaining the defendant's claim to the right to the property. From this judgment, the plaintiff appeals.

During the year 1911, the Florence-Rae Copper Company, a corporation, was the owner of the possessory right to two groups of mining claims situated in the Sultan Basin Mining District, in Snohomish

¹Reported in 178 Pac. 462.

county. One group is referred to as the Florence-Rae Group and consists of seventeen or eighteen claims. The other is referred to as the North Coast Group and consists of four claims, which are the ones here in dispute. The claims in neither group had gone to patent, and therefore it was necessary that the annual assessment work required by the Federal and state statutes be performed in order to keep alive the inchoate title and the possessory right. The assessment work for 1911 and prior years had been done as required by law. On July 14, 1913, one Roy J. Kimbel, claiming that the assessment work on the Florence-Rae Group had not been performed for the year 1912, attempted to relocate a number of claims of that group. As soon as the officers and agents of the Florence-Rae Copper Company learned of this attempted relocation, an action was speedily begun, asserting the rights of that company to all of the eighteen claims and denying that any of them were subject to relocation. The right of the company to the claims was sustained by this court in *Florence-Rae Copper Co. v. Kimbel*, 85 Wash. 162, 147 Pac. 881, the opinion being filed April 17, 1915.

On June 9, 1913, F. M. Curtis and William Statroen attempted to relocate the North Coast Group of four claims. The location notices were given to the secretary of the Florence-Rae Company and he caused them to be filed, and also assisted in restaking the claims. The other officers of that company, through its secretary, were informed that Curtis and Statroen had attempted to relocate the claims, claiming that the assessment work upon them for the year 1912 had not been performed. On the 9th day of March, 1914, Curtis and Statroen filed amended relocation notices, and on the following day, by quitclaim deed, conveyed the four claims to the Iowa Mining Company, the re-

spondent. Thereafter, this company entered into possession, and prior to August 5, 1915, when the present action was instituted, had expended in developing the property approximately \$15,000. Valuable ore had been discovered, and approximately \$7,000 worth thereof had been shipped to the smelter. The appellant at no time asserted a right to these claims as against respondent until on or about July 4, 1915. When the first car of ore was shipped, it wrote a letter to the smelter, claiming the ore. At the time Curtis and Stotroen attempted to relocate the claims, they were stockholders in the Florence-Rae Copper Company, but it does not appear that they had knowledge at that time that the appellant, on December 28, 1911, had contracted for their purchase. These parties became stockholders in the Iowa Mining Company.

Much of the controversy is over the question whether the assessment work for the year 1912 had been performed, and also the further question as to whether the attempted relocation was valid. As we view the case, it will be unnecessary to decide these questions, because the decision of the case is controlled by another question which will be presently mentioned. It will be assumed, but not decided, that the assessment work for the year 1912 had been performed on the four claims in controversy, and that the attempted relocation was invalid.

Accepting the assumptions just stated, the controlling question is whether the appellant was estopped from asserting a possessory right to the claims. The evidence shows that the appellant, through its officers and agents, had knowledge of the attempted relocation within a very short time after it occurred, and had knowledge that the respondent was in possession and developing the claims. It remained silent and failed to assert any right to the property

for more than two years. The first assertion of a claim to the ownership of the property, as against the respondent, was after a large amount of money had been expended upon the claims and valuable ore therefrom had been shipped to the smelter, and after the case of the *Florence-Rae Copper Co. v. Kimbel, supra*, had been decided by this court.

Under these circumstances, it must be held that the appellant is estopped to assert a possessory right to the claims. When the attempted relocation was made, the appellant had only an inchoate title and the right to possession, which was susceptible to abandonment. *Grand Prize Hydraulic Mines v. Boswell*, 83 Ore. 1, 151 Pac. 368, 162 Pac. 1063; *Sharkey v. Candiani*, 48 Ore. 112, 85 Pac. 219, 7 L. R. A. (N. S.) 791.

In the case last cited, the question here presented was involved. The defendant in that case had made locations of a mining claim with knowledge and consent of the owners of another claim with which it conflicted. After the defendant had discovered a valuable body of ore, the plaintiff, upon investigation, discovered that the claim upon which the ore was discovered overlapped one which he had previously located. Up to this time the parties had labored under a mistake as to the true boundary of the claims. The plaintiff knew of the defendant's location and that he was working the claim. It was held that the plaintiff was estopped to assert title to the property in dispute. It was there said:

“Experience in the mining regions teaches that locations of mineral bearing rock are frequently made on public land for speculative purposes only, and are often considered of little value until paying ore is discovered in the immediate vicinity, when, without any expense to the locators, they may become of immense worth. Such possible fluctuations in value demand a different rule from that which usually governs vested

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estates in land, and necessitates immediate assertion of inchoate rights in mining claims, when, by the exercise of reasonable diligence, the locators could have discovered that their premises were being invaded, Dyson, Standish, and Frank and Fred Sharkey, who are experienced miners and should have known the location of the boundaries of the Louise and of the Lucky Boy No. 4 mining claims, ought to be estopped to assert that they had any interest therein in conflict with the claim of Candiani as originally indicated on the ground. To allow them to assert an adverse claim to that part of the Doctor lode now in controversy, as it should be surveyed, would be violative of every principle of equity and result in rewarding them for encouraging the development of the property."

The facts in the present case present a stronger ground for estoppel than do the facts in that case. The decision of this question being controlling, it becomes unnecessary to review the other questions discussed in the briefs.

The judgment will be affirmed.

PARKER, FULLERTON, MOUNT, and HOLCOMB, JJ., concur.

[No. 14883. Department One. February 11, 1919.]

FARMERS GRAIN & SUPPLY COMPANY, *Appellant*, v.
F. W. LEMLEY, *Respondent*.¹

SALES (77)—FAILURE TO DELIVER—EXCUSE—BREACH. Where a contract for the sale of bulk wheat required delivery within a certain time at a specified warehouse, inability of the warehouse to receive it within the time specified does not absolve the seller from making delivery as one of the concurrent acts which he assumed, and he is liable in damages, where he declares the contract at an end and makes no effort to make delivery at any place (Chadwick, C. J., and Tolman, J., dissenting; overruled on rehearing).

ON REHEARING EN BANC.

SAME (77). Where a contract for the sale of bulk wheat, required delivery within a certain time at a specified warehouse, inability of the warehouse to receive it within the time specified absolves the seller from making delivery and puts an end to the contract, where the buyer, upon notice of the conditions, failed to provide any place where delivery could be made without additional labor or expense on the part of the seller.

Appeal from a judgment of the superior court for Whitman county, Mills, J., entered November 2, 1917, dismissing an action on contract, after a trial to the court upon an agreed statement of facts. Affirmed.

Samuel P. Weaver, for appellant, contended, *inter alia*, that it was defendant's duty to deliver the grain in the warehouse. *Culp v. Sandoval*, 22 N. M. 71, 159 Pac. 956; *Eckel v. Murphey*, 15 Pa. St. 488, 53 Am. Dec. 607.

The tender must be made to the purchaser. 38 Cyc. 143, 144, 156; *Olsen v. Northern Steamship Co.*, 70 Wash. 493, 127 Pac. 112; *Coyle Consol. Cos. v. Swift & Co.*, 42 Okl. 613, 141 Pac. 1114.

The defendant by his own contract laid a charge upon himself which he was bound to perform or pay

¹Reported in 178 Pac. 640; 181 Pac. 858.

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Citations of Counsel.

the damages for nonperformance. 9 Cyc. 625-629; 35 Cyc. 244, 245; 6 R. C. L. 1014; 9 R. C. L. 997; *Isaacson v. Starrett*, 56 Wash. 18, 104 Pac. 115; *Reichenbach v. Sage*, 13 Wash. 364, 43 Pac. 354, 52 Am. St. 51; *Dermott v. Jones*, 2 Wall. (U. S.) 1; *Runyan v. Culver*, 168 Ky. 45, 181 S. W. 640; note, L. R. A. 1916F, pages 10-83; *Summers v. Hibbard, Spencer, Bartlett & Co.*, 153 Ill. 102, 38 N. E. 899, 46 Am. St. 872; *Hansen v. Dodwell Dock & Warehouse Co.*, 100 Wash. 46, 170 Pac. 346, L. R. A. 1918C 925; *Reid v. Edwards*, 7 Port. (Ala.) 508, 31 Am. Dec. 720.

The law required the defendant to tender the best possible delivery. 35 Cyc. 170, 177; *Larabee Co. v. Crossman*, 100 App. Div. 499, 92 N. Y. Supp. 565; *McKee v. Retter*, 10 Ill. (5 Gilman) 315; *Newell v. New Holstein Canning Co.*, 119 Wis. 635, 97 N. W. 487; *Fleishman v. Meyer*, 46 Ore. 267, 80 Pac. 209.

He was not excused from performance. 6 R. C. L. 327, 375; *Board of Education of Bath Tp., Allen County v. Townsend*, 63 Ohio St. 514, 59 N. E. 223, 52 L. R. A. 868; *Eugster v. West & Co.*, 35 La. Ann. 119, 48 Am. Rep. 232; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Huyett & Smith Mfg. Co. v. Chicago Edison Co.*, 167 Ill. 233, 47 N. E. 384, 59 Am. St. 272, and note, pages 277-295; *Anderson v. May*, 50 Minn. 280, 52 N. W. 530, 36 Am. St. 642, 17 L. R. A. 555.

Charles E. Fleming, for respondent, contended, among other things, that the plaintiff was bound to allege and prove that he was ready and willing to receive delivery at the place of performance. 35 Cyc. 249, 250, 262, 619; Boone's *Estee's Pleadings* (4th ed.), § 1418; *Vail v. Rice*, 5 N. Y. 155; *Dunham v. Pettie*, 8 N. Y. 508; *Hawley, Dodd & Co. v. Kenoyer*, 1 Wash. Terr. 609; *Barton v. McKelway*, 22 N. J. L. 165;

Meeker v. Johnson, 5 Wash. 718, 32 Pac. 772, 34 Pac. 148; *Roberts v. Mazeppa Mill Co.*, 30 Minn. 413, 15 N. W. 680; *Hughes Produce Co. v. Pulley*, 47 Utah 544, 155 Pac. 337, L. R. A. 1916D 728.

It was not necessary to tender all of the grain at the place of delivery. 35 Cyc. 169; 28 Am. & Eng. Ency. Law (2d ed.), p. 5; *Hughes v. United States*, 4 Court of Claims 64; *Kane v. Borthwick*, 50 Wash. 8, 96 Pac. 516, 18 L. R. A. (N. S.) 486; *Gaines & Sea v. Reynolds Tobacco Co.*, 171 Ky. 783, 188 S. W. 847.

Refusal to accept defendant's unequivocal offer to perform discharged the contract. 9 Cyc. 625; 35 Cyc. 119, 176, 251; Boone's Estee's Pleadings (4th ed.), § 1389; *Robinson v. Thoma*, 30 Wash. 129, 70 Pac. 240; *Madden v. Lemke*, 86 Mich. 139, 48 N. W. 785; *Wilson v. Empire Dairy-Salt Co.*, 50 App. Div. 114, 63 N. Y. Supp. 565.

MITCHELL, J.—On August 10, 1916, the parties to this suit entered into a written contract as follows:

“Farmers Grain & Supply Co. G48

“Grain Contract G48

“No. 52 Lamont, Wash., Aug. 10, 1916.

“The undersigned F. W. Lemley (called the seller) sells and agrees to deliver to Farmers Grain & Supply Co. (called the purchaser), who agree to buy from the seller twenty-five hundred (2500) bushels W. Hybrid Wheat at the price of \$1.02 per bu. net weight, free and clear of all encumbrances, on the basis of No. 1 quality to be delivered and weighed at Farmers warehouse at Ewan, in the State of Wash. on or before the 30th day of Oct. this year, in bulk, Barley or oats may be—

“Marketable grain of the same variety, but lower grade, grown by the seller will be received under this contract, the purchaser to have a discount from the contract price equal to difference in market value, there prevailing, between quality delivered and qual-

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ity stipulated. Time of delivery is of the essence of this contract.

“The seller acknowledges receipt of \$1 as earnest and part payment; balance purchase price, less all advances, payable with check or draft at the time of delivery.

F. W. Lemley (Seller)

“Farmers Grain & Supply Co. (Purchaser)

“By R. W. Wallace (Their Agent)”

On November 28, 1916, the wheat not having been delivered, the purchaser brought suit to recover \$1,075—the difference between the contract price and the market price on October 30, 1916. After the issues were made up, the case came on for trial, at which time the facts were stipulated in writing and filed on June 22, 1917. The trial court entered judgment against plaintiff, dismissing the action. Plaintiff's motion for a new trial being denied, it has appealed from the judgment.

The facts of the controversy are as follows:

“That, on August 10, 1916, F. W. Lemley went to Lamont, Washington, to consult R. W. Wallace, the president of Farmers Grain & Supply Company, concerning the sale of certain Hybrid wheat; that, prior to this date the said R. W. Wallace and said F. W. Lemley were not acquainted with each other; that, in the course of their conversation, Wallace asked Lemley where he desired to deliver the grain and Lemley replied that he desired to deliver it at the Farmers warehouse at Ewan, Washington; that thereafter the price was agreed upon and their agreement embodied in a written contract; that Lemley took the said contract with him and later signed it and mailed it to Farmers Grain & Supply Company; that the original of said contract is herewith marked ‘Exhibit A’ and made a part hereof.

“That thereafter and on or about October 15, 1916, F. W. Lemley called R. W. Wallace, the president of Farmers Grain & Supply Company, by telephone and told him that the elevator was full and that it couldn't

handle the wheat at that time, that the elevator had been full on September 25, 1916, and was then full and could not receive the grain at that time. He also asked Wallace what could be done about the matter, that he was ready to deliver the grain; that when Lemley told Wallace that there were no bins to put bulk wheat in at the Farmers Warehouse at Ewan, Washington, Wallace answered that it was not his duty to furnish bins, and Lemley answered that it was not his duty to furnish them; that Wallace then told Lemley that he would grant an extension of time for the delivery and Lemley said that he had time enough to deliver; Lemley then told Wallace that he (Wallace) had two bins of bulk grain in the Farmers Warehouse and asked Wallace if he (Wallace) could not ship out and empty one of the bins so that Lemley could put the wheat in, and Wallace replied that it could be done if they could get cars to ship the grain out, and Lemley then told Wallace that if he could make such arrangements to let him know; Wallace endeavored to get cars to ship out the grain then in the bins but was unable to get any cars; Wallace also told Lemley that he did not own or have control of the bins in any way and that if he did ship the grain out that Lemley would have to get the bins from the management at the warehouse, but that Wallace would do anything he could to assist Lemley to secure the bins.

"That, after the making of said contract, Mr. Lemley procured the necessary wagon boxes in which to haul said bulk wheat to the warehouse, which was prior to the time when he knew that the warehouse could not receive the grain.

"That, on or about the 28th day of October, 1916, Mr. Lemley took a load of bulk grain to the Farmers warehouse at Ewan for delivery under the contract, and said warehouse refused to receive it for the reason that they had no room and no bins; Lemley asked the manager of the warehouse if he had sacks in which he could sack the grain and was informed that the warehouse did not have sacks, whereupon Lemley took the grain to the Milwaukee warehouse and sacked said grain and stored it in his own name.

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“That a few days after November 1, 1916, Lemley went to the office of Farmers Grain & Supply Company at Lamont, Washington, and at that time he saw R. W. Wallace and told him that the elevator had no room to receive the bulk grain, and also told Wallace that he had sold the grain early so that he could get money to pay his threshing expenses; that anyhow the elevator was full and he could not get the money as he had figured; that Wallace then got his check book, contract and purchase report and told Lemley that he would pay him for the wheat and that the wheat could be left at the ranch until he could deliver the wheat in the warehouse at Ewan; that Wallace had begun to write a check when Lemley said that the wheat must be accepted as No. 1; that he had purchased the bins at St. John, Washington, and that there was danger of them leaking, or the grain spoiling from the wet weather; that Wallace replied that Lemley would of course be required to deliver the wheat at Ewan and have it graded according to the contract; that Lemley then said that he would not stand the loss of any spoiled wheat; Wallace then offered to furnish sacks to Lemley to sack the wheat so that it could be delivered at once to the Farmers warehouse at Ewan instead of at the elevator. Mr. Wallace says that he told Lemley that he would charge him a certain price for the sacks and that upon the delivery of the grain in the sacks he would allow him the amount originally charged for the sacks. Lemley says that he understood that he was to pay for the sacks. Lemley then told Wallace that he had already started plowing and couldn't afford to put off the plowing and haul the wheat. When Lemley left Wallace that day he said he would think the matter over, however, and let him know. Lemley told Wallace that he considered the contract at an end because it had been impossible for the warehouse to receive the grain within the time mentioned in the contract.

“J. H. Beaughan, who was then working for the Farmers Grain & Supply Company, at the request of Mr. Wallace, went to see Mr. Lemley on or about the

20th day of November, 1916; Beaughan went to Lemley's ranch and there he saw two loads of sacked grain by a gate. Lemley told him that it was his grain and that he was hauling it to the Milwaukee warehouse at Ewan. Beaughan then asked Lemley if he would turn the tickets of the Milwaukee Warehouse Company over to the Farmers Grain & Supply Company, and Lemley replied that he would not do so. Lemley said that he was under no obligations to haul the wheat under that contract. Beaughan then showed Lemley a letter written by Mr. Samuel P. Weaver, in which Mr. Weaver set forth that Mr. Lemley, in the event that he did not deliver the wheat, would be liable in damages to the Farmers Grain & Supply Company for the difference between the contract price and the market price on October 30, 1916; that Mr. Lemley read the letter and said that that letter had nothing to do with his case. Lemley said further that the contract had expired and that he was hauling the grain in his own name.

"That the market price of White Hybrid wheat No. 1 quality at Ewan, Washington, on October 30, 1916, was \$1.45 per bushel; that the Farmers Grain & Supply Company had the money and was financially able to pay for the wheat."

Whatever the pleadings in this case may be, the cause must be determined upon the stipulated facts. On August 10, 1916, in making the contract, it is plain both parties, anticipating no difficulty, thought that delivery of the wheat would be made by weighing and storing it at the Farmers warehouse at Ewan, a depository selected by respondent. An unexpected situation arose. At the time respondent chose to attempt delivery of the wheat, the warehouse or elevator was full, and it continued so. Appellant was not at fault, nor was respondent thereby released from his obligations under the contract. The claim of respondent that appellant's rights were in any way affected or abridged by respondent's taking a load of bulk grain

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to the Farmers warehouse at Ewan for delivery under the contract on October 28, 1916, is without merit. He already knew the warehouse was full, and at the same time he had no right to expect appellant would be present, since there had been no modification of the contract which contemplated storing the grain, as it was hauled, in the warehouse without the necessity of appellant being present. After October 28, 1916, respondent did nothing in the way of a tender or offer of delivery of the wheat at any place or in any manner. Respondent did not do the idle thing of attempting to deliver any wheat at the warehouse on October 29-30, nor the appellant to appear there for any purpose, because the warehouse, being already full, rendered both parties helpless for any such purposes. A few days after November 1, 1916, respondent, not being yet absolved from his obligation under the contract, called on appellant to discuss the matter. In that discussion appellant made offers to bridge the trouble, one of which, made as he was writing a check in full payment for the wheat, was that he would pay for the wheat and let it remain at the ranch until it could be delivered at the warehouse at Ewan. Respondent hedged on every proposition made by appellant, but offered no solution or plan of his own. True, in that conversation respondent told Wallace, president of appellant corporation, he considered the contract at an end *because it had been impossible for the warehouse to receive the grain within the time mentioned in the contract*, but "*when Lemley left Wallace that day he said he would think it over and let him know.*" As to the statement of respondent that he considered the contract at an end because the warehouse could not receive the grain, appellant cannot be held responsible for an erroneous notion of respond-

ent's, nor for a condition upon which that notion was based, to which he in nowise contributed. Appellant might have, with greater show of reason, informed respondent that it considered he had broken his promise to deliver and weigh the wheat at the warehouse and would hold him responsible in damages. When respondent left, he said he would think it over and let appellant know, and not hearing from him, appellant, a few days later, sent an agent to him. Respondent informed the agent that he was hauling the grain in sacks to the Milwaukee warehouse at Ewan, and upon being asked if he would turn the tickets of the Milwaukee warehouse over to the appellant, replied he would not do so, that he was under no obligations to haul the wheat under that contract; and further stated that the contract had expired and that he was hauling the grain in his own name.

It is evident respondent now plants himself squarely on the contention that the contract was at an end, and that he was released because it had been impossible for the warehouse to receive the wheat towards the close of the time mentioned in the contract. This claim is made in the face of the terms of his contract, and in spite of his conduct in treating with appellant subsequent to the time limit fixed in the contract.

Counsel for respondent quotes with approval the following

"If the acts stipulated for are to be performed at the same time, the conditions are concurrent, as where the contract stipulates for delivery and payment to be made on delivery." 35 Cyc. 112.

Indeed, where the contract is silent as to time of payment, delivery and payment are concurrent conditions. But in applying the rule counsel contends that it imposes upon the appellant the burden of showing it had performed all conditions *precedent*, and

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that the obligation resting on it was to receive the wheat within the time and at the place provided in the contract. On the contrary, the rule quoted, which is the correct one, simply means, when applied to this contract, that the obligation of respondent to deliver and weigh the wheat at the Farmers warehouse and the obligation of appellant to pay the balance due at that time and place were concurrent. There is no question of condition precedent involved in the case. In the absence of any provision in the agreement fixing a place for delivery, the general rule is that the delivery shall be made at the place where the goods are at the time of sale, usually the place of business of the seller. In this case, however, appellant asked respondent where he wished to make delivery. Respondent selected and designated the place, and, as it appears, made no arrangements with the owner of that place for storage. He waited for nearly two months after making the contract before inquiring if he could get storage, at which time he learned he could not. He then waited twenty days before notifying appellant of the condition of the warehouse. The delivery and weighing of the wheat at the place selected by respondent was that one of the concurrent obligations of the contract which he assumed, and having done so unconditionally, he will not be permitted to place the blame for his subsequent inability to perform on the other party to the contract. In the case of *Isaacson v. Starrett*, 56 Wash. 18, 104 Pac. 1115, the law is declared as follows:

“The failure to deliver within the time breached the contract, and if, as contended by appellant, his performance was impossible because of subsequent happenings, he was nevertheless liable to respondent for his breach. Having assumed under his contract to deliver within a stipulated time, he was bound to make

such delivery. He could have protected himself in the contract had he desired to do so, but having failed to do so, he must be held answerable for the damages caused respondent because of the broken contract to deliver."

In harmony with the rule just mentioned is another that respondent failed to observe. It is to the effect:

"While strict or literal performance of the contract was therefore rendered impossible, the defendants were not absolutely relieved from their obligation. They were bound to make tender of the best delivery possible under the circumstances; . . ." *Labaree Co. v. Crossman*, 100 App. Div. 499, 92 N. Y. Supp. 565.

See, also, *McKee v. Retter*, 10 Ill. (5 Gilman) 315; 35 Cyc. 170, 177.

And yet, as already noticed, respondent made no attempt whatever, or offer of any kind, to deliver the wheat after he found the warehouse could not receive it. The nearest approach to an offer of delivery was in November, when appellant offered to pay for the wheat and let it remain at the ranch, and respondent stated that the wheat must be accepted as No. 1—thus demanding a modification of the contract to his advantage.

Promptly upon respondent's specific disavowal of liability upon the contract, appellant sued. Citation of authorities is not necessary in support of the well known rule that a refusal on the part of the seller to comply with his contract entitles the buyer to sue to recover his damages, which in such case as this is the difference between the contract price of the article and its market price at the time of the breach of the contract.

The judgment is reversed, and the cause remanded with directions to enter judgment in favor of appel-

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Dissenting Opinion Per TOLMAN, J.

lant for the sum of \$1,075, with interest at six per cent per annum from October 30, 1916.

MAIN and MACKINTOSH, JJ., concur.

TOLMAN, J. (dissenting) — I dissent. Respondent contracted to deliver grain in bulk only. It is a well known fact, of which we may take judicial notice, that bulk wheat differs from sacked wheat, in that the latter includes the labor of sacking and the cost of the sacks in which it is contained, and commands a higher price in the market than bulk wheat. Therefore, under the contract, respondent was under no duty, in any event, to deliver sacked wheat. The place of delivery was mutually agreed upon and named in the contract, and it is immaterial which party first proposed it. Presumably it was a public warehouse, as we cannot assume that the parties contracted for delivery at a private warehouse controlled by neither, without consulting the person who did control it. The wheat when delivered to such warehouse would belong to appellant, and the warehouseman would become its agent to care for the wheat, and not the agent of respondent, whose interest in the wheat would cease upon making delivery. Therefore, when appellant was advised that the warehouse named in the contract could not receive the wheat in bulk, it was its duty, within the time fixed for delivery, or at least within a reasonable time, to provide means by which respondent could deliver the wheat to it, without additional labor or expense on his part over the labor and expense of the delivery provided for in the contract. In my opinion, respondent did all that the law requires when he advised appellant of conditions at the warehouse, and that he was ready to make delivery; and the facts, as stated in the majority opinion, amply

convince me that he waited a reasonable time thereafter for appellant to provide means for receiving the wheat. If any tender was required, the tender made was sufficient. *Roberts v. Mazeppa Mill Co.*, 30 Minn. 413, 15 N. W. 680. To hold otherwise is to say that buyers of grain, stock, and other like products, may, in all such cases, compel the seller to hold the product indefinitely at his own risk and expense, while the buyer awaits an advance in the market price. It is no answer to say that appellant offered to provide sacks, or to pay for the wheat and permit respondent to make delivery later. As to the first proposition, appellant did not offer to furnish sacks and the labor of sacking the wheat; and as to the latter, it is well known that but few farmers have facilities for holding grain for any length of time without danger of loss and deterioration; and the offer was insufficient unless it included, besides the offered payment, a like immediate grading and weighing, so that any subsequent loss in quantity or quality would fall upon the buyer only. In the nature of things, the buyer of wheat must provide the place in which it is to be stored when delivered to him; and this the buyer in this case did not do.

The authorities cited in the majority opinion have no application to the facts. Much more applicable is the case of *Duckham v. Smith*, 5 T. B. Mon. (21 Ky.) 372, in which it is held that a covenant to deliver at a warehouse does not require the covenanter to put the goods in the warehouse; and the case of *Lockhart v. Bonsall*, 77 Pa. St. 53, in which it is held that, where the buyer of 118 cars of oil directed its delivery at a certain sidetrack which would hold but 12 cars, the storing of the remainder upon nearby sidetracks was a delivery. In principle, our own case of *Meeker v.*

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Syllabus.

Johnson, 5 Wash. 718, 32 Pac. 772, 34 Pac. 148, is in harmony with these views.

The judgment appealed from should be affirmed.

CHADWICK, C. J., concurs with TOLMAN, J.

ON REHEARING.

[*En Banc*. May 31, 1919.]

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adopts the dissenting opinion heretofore filed in this case as the opinion of the court, and the judgment appealed from will be affirmed.

[No. 14888. Department One. February 11, 1919.]

RAYMOND BORG *et al.*, *Appellants*, v.
H. W. BRINGHURST, *Respondent*.¹

MALICIOUS PROSECUTION (14-1)—EVIDENCE—ADMISSIBILITY—REASON FOR DISMISSAL. In an action for malicious prosecution, the plaintiff, in making a *prima facie* case by proof of dismissal of the criminal charge, is not entitled to show the reason for the dismissal by the examining magistrate.

TRIAL (24)—RECEPTION OF EVIDENCE—CUMULATIVE EVIDENCE. It is not error to exclude a certified copy of a judgment of dismissal which would only have been cumulative evidence of an admitted fact.

MALICIOUS PROSECUTION (14)—PROBABLE CAUSE—ADMISSIBILITY. In an action for malicious prosecution, under a general denial the defendant may show probable cause by proof of a full and true disclosure to the prosecuting attorney who directed the filing of the complaint.

SAME (3, 15)—PROBABLE CAUSE—ADVICE OF PROSECUTOR—EVIDENCE—SUFFICIENCY. Probable cause for a criminal prosecution is established as a matter of law, by a full and true disclosure of the facts to the prosecuting attorney who directed institution of the proceedings; and it is immaterial that the evidence was largely hearsay, and insufficient to secure conviction.

¹Reported in 178 Pac. 450.

Appeal from a judgment of the superior court for King county, Frater, J., entered September 29, 1917, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for malicious prosecution. Affirmed.

Vince H. Faben, for appellants.

Hugh M. Caldwell and *Walter F. Meier*, for respondent.

MACKINTOSH, J.—The defendant was fire marshal of the city of Seattle, and, as such, investigated a fire on the premises occupied by the mother of the appellant husband. In this investigation he was assisted by two detectives from the police department, and, at the conclusion of the investigation, the matters discovered were laid before the prosecuting attorney of King county, who directed that a complaint be made against the appellant wife, charging her with the crime of arson. Later the complaint was dismissed by the examining magistrate, and this action was then commenced against the fire marshal to recover damages for malicious prosecution and false imprisonment. At the conclusion of the trial in the superior court, the defendant moved for a directed verdict, which was granted. The complaint, after alleging that the charge of arson was wholly untrue, and was wickedly and maliciously laid against the plaintiff, alleged “that the charge was dismissed by the prosecuting attorney of King county before the trial and pending the hearing, because there was no evidence to sustain the charge, and upon motion and suggestion of the prosecuting attorney, the justice of the peace entered his order of dismissal of the charge.” A motion having been made against this portion of the complaint, it was stricken.

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On the trial, evidence was excluded concerning the reason prompting the examining magistrate to dismiss the criminal complaint, the court refusing to admit a certified copy of the judgment of dismissal. These two correlated matters are assigned as error. *Aldrich v. Inland Empire Tel. & Tel. Co.*, 62 Wash. 173, 113 Pac. 264, held that, in an action such as this, the plaintiff is entitled to show a dismissal of the criminal charge as *prima facie* evidence of want of cause, but that the reason given by the justice for such dismissal cannot be shown. The plaintiff was entitled to the legal effect of the dismissal but to nothing more. The evidence offered was, for this same reason, properly excluded, the fact of dismissal having been admitted by the pleadings and by a statement in open court. It was not error to refuse to receive a certified copy of the judgment, for the reason that such certified copy would only have been cumulative evidence of the fact which had already been admitted. *State v. King*, 67 Wash. 651, 122 Pac. 323; *Klodek v. May Creek Logging Co.*, 71 Wash. 573, 129 Pac. 99; *In re Northlake Avenue*, 96 Wash. 344, 165 Pac. 113.

The other alleged error related to the granting of respondent's motion for a directed verdict. Probable cause can be shown by proof that the defendant made a full and true statement to the prosecuting attorney, who directed the filing of the complaint, and this defense may be shown under a general denial. *Kellogg v. Scheuerman*, 18 Wash. 293, 51 Pac. 344, 52 Pac. 237. In this case the evidence shows that the defendant made a full and frank disclosure to the prosecuting attorney of all the evidence which he had been able to gather through his personal investigation and through the investigation of the detectives who were assisting him. It is true that a great

deal of this evidence was hearsay, but the disclosure which is made to the prosecuting attorney need not be confined to such testimony as would be admissible upon the trial, but, from the very necessity of the case, must, in the great majority of instances, consist of hearsay testimony and the recitation of facts and circumstances which are of the utmost value in determining the propriety of instituting a criminal prosecution. The fact that before or at the trial it may be discovered that the testimony to establish the guilt of the accused may not be available does not operate to render the prosecuting witness liable in damages. When he has disclosed truthfully and freely the information of which he is possessed he has performed his entire duty, and he does not then become a guarantor that the testimony will be available at the time necessary for its production. As soon as it appears from the testimony that such a full and truthful disclosure has been made to the prosecuting officer, and that he has directed the institution of a criminal proceeding, the complaining witness has established probable cause, and in an action against him for malicious prosecution or false imprisonment he is entitled, as a matter of law, to judgment. Where the record discloses, as it does in this case, that the prosecuting witness fully and truthfully communicated all the facts and circumstances then within his knowledge or information, then there exists probable cause, as a matter of law, and there is no question to be submitted to the jury. *Simmons v. Gardner*, 46 Wash. 282, 89 Pac. 887, L. R. A. 1915D 16; *Hightower v. Union Savings & Trust Co.*, 88 Wash. 179, 152 Pac. 1015, Ann. Cas. 1918A 489.

Judgment affirmed.

CHADWICK, C. J., TOLMAN, MAIN, and MITCHELL, JJ.,
concur.

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Opinion Per FULLERTON, J.

[No. 14978. Department Two. February 11, 1919.]

ANNIE FOY, *Appellant*, v. PACIFIC POWER & LIGHT
COMPANY, *Respondent*.¹

HUSBAND AND WIFE (21)—WIFE'S SEPARATE ESTATE—EARNINGS. A married woman may receive the wages for her personal service, earned under a contract made and performed during coverture, when such earnings were her separate property.

PARTIES (51)—REAL PARTY IN INTEREST—OBJECTIONS—WAIVER. An objection that a married woman is not the real party in interest, in her action to recover for wages upon her contract made during coverture is waived if not made when the defendant first appears in the action.

HUSBAND AND WIFE (21, 23-1, 60)—WIFE'S SEPARATE ESTATE—EARNINGS—EVIDENCE—SUFFICIENCY. Where a married man, employed in a pumping plant by a city, made an arrangement whereby the city was to employ and pay his wife wages for assisting, and thereafter receipted for his own wages and made no claim for hers, there was sufficient evidence to support a finding that her wages were her separate property.

Appeal from a judgment of the superior court for Franklin county, Oswald, J., entered May 6, 1918, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Chas. W. Johnson, for appellant.

M. L. Driscoll, John A. Laing, and H. W. Strong, for respondent.

FULLERTON, J.—In this action the appellant sought to recover from the respondent for personal services rendered, as she alleges, under an oral contract of employment. To the complaint, which embodied the appellant's claims, the respondent answered by a general denial. On the issues as thus framed, a trial was

¹Reported in 178 Pac. 452.

had before a jury, which returned a verdict in favor of the appellant for the full amount claimed. After the return of the verdict, the respondent moved for judgment notwithstanding the verdict, which motion the trial court granted, entering a judgment to the effect that the appellant take nothing by her action. This appeal is from the judgment so entered.

The complaint and the evidence disclosed that the contract on which recovery was sought was entered into while the appellant was a married woman living with her husband, that it was performed while coverture existed, and that the action was brought after the death of the husband, by the appellant suing in her own right. Based on the conclusion that the presumption arising from the facts recited was that the obligation sued upon was a community obligation, and the conclusion that other evidence in the record did not overcome the presumption, the court held that the appellant was not the real party in interest, and hence could not maintain the action.

We think the court erred in its conclusion, for at least two reasons. In the first place, there was no issue upon the appellant's right to maintain the action. The complaint itself disclosed all of the facts thought to deny a right of recovery in the appellant, yet there was no motion or demurrer to the complaint, nor was the objection set forth in the answer. The case was twice tried to a jury, in each of which trials the jury returned a verdict for the appellant, yet at no time during the progress of either trial, prior to the return of the last verdict, did the respondent make the objection that the appellant could not maintain the action. This was a waiver of the objection. It must be remembered that this is not an objection fatal under all circumstances. Under our statute, a wife may receive the wages for her personal labor and maintain an

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action therefor in her own name and hold the same in her own right, when such earnings are her separate property, even though earned under a contract made and performed during coverture. It must follow, we think, that where a woman sues in her own right for money earned during coverture, and no question is made as to her right to maintain the action until after the return of the verdict, the objection comes too late. This case well illustrates the hardships of a contrary rule. If the objection had been made when the respondent first appeared in the action, the objection could either have been cured by an amendment to the complaint, or the objection confessed and a tedious and expensive trial averted. If it had been raised during the course of the trial, the appellant would have had an opportunity to correct it by evidence. Raised, as it was, after verdict, it operates as a bar to a further action; if not by the rule of *res judicata*, by the rule of the statute of limitations. A rule of practice which leads to such an unconscionable result is certainly not to be favored, and ought not to be followed unless every other remedy is foreclosed.

In the second place, we think there is evidence in the record which, in the absence of an issue on the question, is sufficient to overcome the presumption of the community nature of the obligation sued upon. The evidence need not be detailed at length. Briefly, the respondent owned a pumping plant and was engaged in supplying the city of Pasco and the surrounding territory with water. The appellant's husband was employed to operate the plant. After working a short time, he complained to the company of the excessive hours he was required to be engaged and the meagerness of the wages paid for the services required. As a relief he proposed that the respondent employ both himself and his wife jointly at an increased wage. The

respondent declined to do this, but, as a counter proposal, offered to continue him at his then wage and employ the wife separately, allowing and paying to her a fixed rate for all time the plant should be required to be operated in excess of eight hours per day, his wages to be paid monthly as they were earned, hers to be held until a final settlement and paid to her in a lump sum. The husband assented to this, and thereafter made no claim to her earnings, although receipting in full for the wages earned by himself as they were paid him from time to time. There are no rights of creditors involved, nor is the respondent asserting the community character of the obligation that it may offset against it an obligation due from the community to it. Its assertion is made for the sole purpose of defeating its obligation to pay the debt. Under these circumstances, it seems to us too much to say that there was no evidence, or inference arising from evidence, from which the jury could find that the claim sued for was the separate property of the appellant. This being true, the courts are not authorized to find to the contrary. The jury, not the court, is the trier of the fact.

The respondent argues that there is no evidence to support the verdict, and that the judgment of the court can be sustained upon this ground, even if erroneous on the ground assigned. It must be confessed that the contract as set forth in the complaint does present peculiar features, so out of the ordinary, indeed, as challenge the trier of the fact to scrutinize closely the evidence by which it is sought to be supported. But we agree with the trial court that it was supported by substantial evidence. The case is not, therefore, one where the court may direct a judgment in disregard of the verdict of the jury.

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The judgment is reversed, and the cause remanded with instructions to overrule the motion for judgment notwithstanding the verdict, and to proceed to a final determination of the controversy.

MAIN, MOUNT, PARKER, and HOLCOMB, JJ., concur.

[No. 14990. Department One. February 11, 1919.]

E. M. GORDON *et al.*, Respondents, v. C. D. HILLMAN
et al., Appellants.¹

CORPORATIONS (196) — CIVIL ACTIONS — PROCESS — AGENTS. Upon conflicting affidavits upon an issue as to whether one B. was an agent of the defendant corporation upon whom service could be made, the court need not believe the positive denial of B., but is warranted in finding him such agent from the showing that his name appeared as such in the city directory and was so listed with the custom house.

APPEAL (159)—PRESERVATION OF GROUNDS—NECESSITY OF MOVING AGAINST DEFAULT. Error in entering default judgment against defendant, upon quashing his special appearance, without giving any opportunity to defend, cannot be urged in the absence of any motion or request for relief in the lower court.

Appeal from a judgment of the superior court for King county, Smith, J., entered March 18, 1918, in favor of the plaintiff, in garnishment proceedings, tried to the court. Affirmed.

Gay & Griffin and *Geo. H. Rummens*, for appellants.

Byers & Byers and *Aust & Terhune*, for respondents.

MACKINTOSH, J.—The plaintiffs, having a judgment against the defendants Hillman and wife, caused a writ of garnishment to be issued directed to the Pacific Excursion Company. This writ was served upon

¹Reported in 178 Pac. 625.

one E. S. Bateman. The company made a special appearance and moved to quash the writ on the ground that it had not been served upon a properly qualified representative of the company. In support of this motion, it produced the affidavit of Bateman, who swore that he was neither the president, vice president, secretary, general manager nor managing agent of the Pacific Excursion Company, and not a person recognized in law upon whom service could be made. The plaintiffs filed a counter-affidavit which set up the fact that Bateman's name appeared in the Seattle city directory as manager of the company, and was listed with the custom house as the managing agent of the Pacific Excursion Company. A counter-affidavit of Bateman stated that at one time he had been listed as managing agent, but did not have the full management of the company's affairs. Upon this record the court found that Bateman was, in fact, the managing agent of the Pacific Excursion Company, and dismissed the special appearance. Thereafter the court entered judgment upon the writ of garnishment against the Pacific Excursion Company.

Errors alleged are (1) that proper service could not be effected upon the company by service upon Bateman; and (2) that, after having quashed the special appearance, the court erred in entering judgment by default against the Pacific Excursion Company. In answer to the first contention, it is sufficient to say that the court was not compelled to believe the affidavits of Bateman that he was not the managing agent of the garnishee defendant, and, from the counter-evidence which was produced, had a right to find that he was such agent. The mere fact that his statement is positive is not binding upon the court, which is never bound by testimony which it does not believe.

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Opinion Per MACKINTOSH, J.

On the second point, the record does not disclose that any request was made to the trial court for an opportunity to present an answer to the writ, nor was any motion made to vacate the judgment, the only objection which the record discloses being to the order of the court quashing the special appearance. We have repeatedly held that, where no motion is made in the court below to set aside a judgment, this court will not enter into an investigation of the merits of the question as to whether or not such judgment was regular. The parties appealing should have sought some relief from the judgment, by motion or otherwise, in the lower court before their appearance here. *Belles v. Carroll*, 6 Wash. 131, 32 Pac. 1060; *Main v. Johnson*, 7 Wash. 321, 35 Pac. 67; *State ex rel. Hennessy v. Huston*, 32 Wash. 154, 72 Pac. 1015; *Hubenthal v. Spokane & Inland Empire R. Co.*, 43 Wash. 677, 86 Pac. 955.

The judgment is affirmed.

CHADWICK, C. J., MITCHELL, MAIN, and TOLMAN, JJ.,
CONCUR.

[No. 14848. Department Two. February 13, 1919.]

In the Matter of the Estate of WILLIAM C. FINN.
MARGARET FINN, Respondent, v. GEORGE L. FINN et al.,
*as Executors etc., Appellants.*¹

EXECUTORS AND ADMINISTRATORS (134) — SALES — VACATION — GROUNDS. A widow interested in an estate, whose offer for a tractor sold by the executors was ten dollars less than the bid of the purchaser to whom sale was made, cannot object to the sale, either as a prospective purchaser or on account of her interest in the estate, where the sale was fairly conducted and as open to her as to the purchaser and brought more than the appraised value.

Appeal from an order of the superior court for Benton county, Truax, J., entered November 2, 1917, setting aside a sale made by executors under order of court, after a hearing before the court. Reversed.

McGregor & Fristoe, for appellants.

Andrew Brown and *Grady & Shumate*, for respondent.

PARKER, J.—This is an appeal from an order of the superior court for Benton county, setting aside a sale of a gasoline tractor engine, made by George L. and Frank J. Finn, as executors of the estate of William C. Finn, deceased, to William Buchholtz. The order setting aside the sale was made upon the hearing of the petition of Margaret Finn and the evidence introduced in support thereof. The recitals in the order indicate that it was by the court rested upon the conduct of the executors, resulting in Buchholtz obtaining an unfair advantage over Mrs. Finn, who desired to purchase the tractor, and also upon the knowledge of such conduct on the part of the executors by Buchholtz. No findings, however, are made in the order

¹Reported in 178 Pac. 449.

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or otherwise by the court, specifying in what particular the acts of the executors were improper or unfair.

Margaret Finn is the widow of the deceased and, as such, is interested in the administration of the estate. A stipulation, to which she was a party, was entered into by all parties concerned and filed in the case, whereby it was stipulated that the tractor, with other personal property belonging to the estate, should be sold, and that the court should enter an order therefor accordingly. No manner of conducting the sale was stipulated for, that being left to be provided for as the court might determine in its order of sale. Thereafter the court entered its order upon the stipulation as follows:

“It is now therefore hereby ordered that all of the personal property which is described in said petition, a list of which is hereto attached, marked exhibit ‘a’, be sold by the executors of said estate at private sale or in such manner as they, the executors, may deem to be the best for said estate, for the best price that can be procured for the same, . . .”

Soon thereafter the executors entered into a tentative agreement with Buchholtz for the sale of the tractor, the purchase price to be \$250, which was the amount of its appraised value. They went with Buchholtz to Mrs. Finn's home to get the tractor, it being there, in order to allow Buchholtz to take it and try it to see that it would run properly, before consummating the sale. She then being informed that they were about to sell the tractor for \$250, she objected to the proposed sale. After some controversy there with one of the executors, she offered \$300 for the tractor. He then told her that, if she would put up that amount in money, they would consider her offer. She did not have the money there, but said that she would go to town and place the money in a bank, avail-

able to the executors. This put an end to the attempted sale to Buchholtz for \$250. We shall assume that Mrs. Finn soon thereafter, possibly the next day, went to town and placed the money in the bank as offered by her.

We think it plain from the evidence that this was not a consummation of any sale to her, since the executors had not accepted her offer, but only told her that they would consider her offer when she tendered the money or placed it in the bank. Further consideration of the matter induced the executors to conclude that they might get more for the tractor than \$300, so they decided to ask for sealed bids from Mrs. Finn, Buchholtz, and at least one other prospective purchaser. Mrs. Finn, Buchholtz, and the other prospective purchaser were invited to make their sealed bids accordingly, and were given a short time to do so. No one but Buchholtz made any bid in response to this invitation, but he did so bid, offering \$310, and accompanied his bid with cash in that sum. Thereupon his bid was accepted, and a bill of sale for the tractor was executed and delivered to him by the executors, thus vesting good title to the tractor in him, unless such sale was void or voidable because of misconduct on his or the executors' part in fraud of the rights of Mrs. Finn as one interested in the estate as the widow of the deceased, or as one who had offered to purchase the tractor for \$300.

After a careful reading of all of the evidence produced upon the hearing, which is here in the form of a statement of facts, we are quite unable to discover any unfair actions on the part of the executors or Buchholtz. Mrs. Finn, we think, acquired no rights whatever by virtue of her \$300 offer, and she had the same opportunity to bid, when the final sealed bids

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were asked for, as any one else, but she did not do so, and she manifestly, therefore, cannot now complain as a rival prospective purchaser. Looking to the record as a whole, it seems that her complaint is based more upon her loss of the opportunity to purchase the tractor than upon any impairment of her rights as one interested in the estate as the widow of the deceased. Indeed, when we look to the recitals of the court in its order setting aside the sale, that order seems to be rested largely upon this same theory. We are quite clear, however, that there was no ground whatever for the setting aside of the sale, whether we view Mrs. Finn as a prospective purchaser or as one interested in the estate. The sale was manifestly fairly conducted, was not in violation of the order of sale in any respect, and was for the amount of \$60 in excess of the appraised value of the tractor. Our decision in *Sharp v. Greene*, 22 Wash. 677, 62 Pac. 147, lends support to our conclusion here reached.

The order setting aside the sale is reversed.

MAIN, HOLCOMB, MOUNT, and FULLERTON, JJ., concur.

[No. 14849. Department Two. February 13, 1919.]

ABRAHAM L. WATSON *et al.*, Respondents, v. F. J.
BARNARD *et al.*, Appellants.¹

APPEAL (389)—REVIEW—AMENDMENTS REGARDED AS MADE. Where, under an amended cross-complaint to foreclose a nonassignable mortgage, it appeared by stipulation that the assignee sued as trustee of an express trust for the benefit of the mortgagees, his complaint will be deemed amended to make himself a party as trustee; in view of Rem. Code, § 180, authorizing a trustee of an express trust to sue in his own name.

MORTGAGES (243)—FORECLOSURE—ATTORNEY'S FEES. In an action to foreclose a junior mortgage providing for an attorney's fee of \$50, and for personal judgment on the mortgage note, which provided for a reasonable attorney's fee, the foreclosure can include only the \$50 fee, but personal judgment may be entered upon the judgment for a reasonable fee; in view of Rem. Code, § 475, which authorizes a reasonable fee on foreclosure of the mortgages in the sum to be fixed by the court, not exceeding the fee fixed by the contract.

SAME (57, 185)—PRIORITY—CONSIDERATION—EVIDENCE. Upon an issue as to the priority of senior mortgages, a *prima facie* case is made by the showing that they were given for money loaned, by introducing the notes and mortgages, and proof of nonpayment and the recording; and shows they were given for a valuable consideration.

SAME (8)—DEBTS SECURED—VALIDITY—GOOD FAITH. The good faith and validity of a senior mortgage is sustained by the fact that it was largely given for an antecedent indebtedness then existing, and to cover future advances to be made, and that a future advance was made very shortly after its execution and delivery.

SAME (60)—PRIORITY—NOTICE—BURDEN OF PROOF. The burden is upon a junior mortgagee to show by clear and convincing evidence that mortgages of prior record were given with actual notice of his mortgage, or of facts sufficient to put upon inquiry.

SAME (233-235)—FORECLOSURE—APPLICATION OF PROCEEDS—PRIORITY. Where a first mortgage was given on an undivided three-fourths of a quarter section, a second mortgage upon the whole tract, a third mortgage upon an undivided one-fourth, and a fourth mortgage upon the whole tract, the third mortgage could not be satisfied out of the proceeds of the sale of the undivided one-fourth,

¹Reported in 173 Pac. 477.

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because the second mortgage was a prior lien thereon, after satisfaction of the first mortgage.

COSTS (62)—APPEAL—MORE FAVORABLE JUDGMENT. A party securing a more favorable judgment on appeal is entitled to costs of the appeal.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for Cowlitz county, Darch, J., entered March 27, 1917, upon findings in favor of the plaintiffs, in consolidated actions to foreclose mortgages, tried to the court. Modified.

Dan E. Hardin, for appellants Barnard *et al.*

M. J. Gore, *Oscar Furuset*, and *Bausman & Oldham* (*Walter L. Nossaman*, of counsel) for appellants Cowlitz County Bank *et al.*

C. E. Moulton, *Graham & Nash*, and *Miller & Wilkinson*, for appellant Nash.

McMaster, Hall & Drowley, for respondents Carlson estate *et al.*

HOLCOMB, J.—These actions, consolidated for trial, involve the foreclosure of four mortgages on real estate in Cowlitz county: (1) mortgage to Watson and Bystrom, as executors and trustees of the estate of Elias Carlson, deceased, dated September 19, 1911, and recorded the same day, for \$5,000, on the undivided three-fourths of the quarter-section of land involved; (2) mortgage to John Cooper, dated November 15, 1913, recorded November 18, 1913, reciting that it is a second mortgage on all of the same quarter-section, for \$2,500; (3) mortgage to the Cowlitz County Bank, dated November 14, 1913, recorded January 2, 1914, for \$4,000, on the undivided one-fourth of the same quarter-section; (4) mortgage to H. H. Schwartz, dated August 14, 1911, recorded Feb-

ruary 24, 1914, for \$4,500, on all of the same quarter-section. This mortgage was assigned to William S. Nash, of record March 26, 1915. The decree establishes priority under these mortgages in the following order: Carlson Estate mortgage first, Cooper mortgage second, Cowlitz County Bank mortgage third, and Schwartz (Nash) mortgage fourth. Nash, who claims under the Schwartz mortgage, the Cowlitz County Bank, represented by State Bank Examiner Hanson, as liquidator, and defendants Barnard and wife have appealed from this decree. The appeals of the Nash and Cowlitz County Bank involve the order of priority, while the defendants Barnard and wife appeal from so much of the judgment as gives Nash judgment and decree foreclosing the Schwartz mortgage under which he claims, and the allowance to Nash of attorney's fee in the foreclosure of \$563.20.

The answer of Barnard and wife to the cross-complaint admits the record of the Schwartz mortgage, and does not deny the execution of the mortgage and note secured thereby, but denies the assignment of the note and mortgage on information and belief, and alleges that Nash is not the owner thereof nor the real party in interest.

After this answer was served, Nash amended his cross-complaint and added an allegation that the note and mortgage were assigned to him upon express trust, and it was stipulated at the trial "that the assignment of the note and mortgage was made to Nash on express trust that he should enforce the collection thereof, that he should pay certain obligations of the co-partnership of Moulton & Schwartz, and after payment of the expenses, pay the proceeds to Moulton and Schwartz". Moulton and Schwartz were attorneys who had conducted a prolonged land contest in

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the land departments of the Federal Government for a number of years under an agreement that, in the event they were successful in behalf of the Barnards in the contest, they were to be compensated by being paid one-fourth of the value of the land upon which the entry was contested. At the conclusion of their labors, which were successful in behalf of the Barnards, on August 11, 1911, the date of the note and mortgage, Moulton and Schwartz and the Barnards agreed to a rough valuation of the tract of land as \$20,000, about \$500 being agreed to be deducted from the amount due Moulton and Schwartz under their agreement, for commutation purchase and proof and the expenses incident thereto; the note was therefore given for \$4,500. The Barnards' answer alleges a partial failure of consideration for the note and mortgage in that Moulton and Schwartz failed to furnish the money with which to commute the Barnards' homestead entry, and further alleges that the note and mortgage were nonnegotiable and nontransferable.

The Barnards contend on their appeal that, since Nash, by his amended cross-complaint, averred that the note and mortgage were nonnegotiable and nontransferable and were assigned to him upon express trust, the nature of which was fully set out, he limited his rights to such rights as he may have as trustee, but did not amend the title or prayer of the cross-complaint, or ask for a substitution of parties making himself a party as trustee, and that, under the terms of the note and mortgage which contained the restrictive clauses against negotiation and transfer, Nash acquired no rights against the Barnards and that his cross-complaint should be dismissed. Appellants Barnard cite: *Behrens v. Cloudy*, 50 Wash. 400, 97 Pac. 450; *Bonds-Foster Lumber Co. v. Northern Pac.*

R. Co., 53 Wash. 302, 101 Pac. 877; *Lockerby v. Amon*, 64 Wash. 24, 116 Pac. 463, Ann. Cas. 1913A 228, 35 L. R. A. (N. S.) 1064; *Oregon & Washington R. & Nav. Co. v. Eastern Oregon Banking Co.*, 81 Wash. 617, 143 Pac. 154; *Hunter Tract Imp. Co. v. Stone*, 58 Wash. 661, 109 Pac. 112, to the effect that whatever may have been the reasons for reserving the right to decline to deal with an assignee, such reservation contravenes no rule of public policy and is enforceable. Nearly all of the foregoing were cases involving contracts for personal services, or contracts between vendors and vendees, or lessors and lessees, where personal relations were involved in the contracts; but the question in *Bonds-Foster Lumber Co. v. Northern Pac. R. Co.*, *supra*, was one involving an alleged bill of lading, where this court held that the assignee of such a contract which expressly declares its nonnegotiability acquires only a cause of action against the assignor. Our statute, Rem. Code, § 180, provides:

“An executor or administrator, or guardian of a minor or person of unsound mind, a trustee of an express trust, or a person authorized by statute, may sue without joining the person for whose benefit the suit is prosecuted.”

Under this statute and under the stipulation noticed before, that Nash was trustee of an express trust to enforce the collection of the note and mortgage of Moulton and Schwartz and pay certain of their co-partnership obligations and account for the proceeds to Moulton and Schwartz, the true relations between Moulton and Schwartz and Nash are shown, and his cross-complaint is to be deemed amended accordingly. In other words, his action on his cross-complaint, and the stipulation, shows this to be an action on behalf of Moulton and Schwartz, or of Schwartz, the mort-

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gagee, through him as trustee. The cases cited, therefore, have no bearing upon this question. The contentions of the appellants Barnard to defeat the recovery by Nash are untenable.

On the question of attorney's fees, however, the note given by the Barnards to Schwartz provides for a reasonable attorney's fee, while the mortgage provides for an attorney's fee in the sum of \$50. Rem. Code, § 475, provides that:

"In all cases of foreclosure of mortgages and in all other cases in which attorney's fees are allowed, the amount thereof shall be fixed by the court at such sum as the court shall deem reasonable, any stipulations in the note, mortgage or other instrument to the contrary notwithstanding; but in no case shall said fee be fixed above contract price stated in said note or contract."

In this case in a suit upon the note alone, the court would be authorized to fix any sum which in his judicial discretion he deemed reasonable, and in this case we do not consider that the allowance of \$563.20, upon the amount to be recovered and the litigation involved, was excessive; but the mortgage provides for an attorney's fee of only \$50, and as the mortgage affects the rights of other incumbrancers as well as the rights of the mortgagors, we are of the opinion that, as a personal judgment against the Barnards in favor of Nash or Moulton and Schwartz, the allowance of \$563.20 as attorney's fees may stand and be included in the judgment, but in the decree of foreclosure under the mortgage, no sum in excess of \$50, the amount contracted for in the mortgage, can be allowed under the statute. To that extent the decree as to Nash is modified.

II. The appeal of the defendant Nash, as trustee for Moulton and Schwartz, involving the priority of

the Carlson Estate Mortgage, the Cooper mortgage, and the Cowlitz County Bank mortgage over the Schwartz mortgage, present principally questions of fact. The evidence as to the question of direct notice from Moulton or Schwartz to the holders of prior recorded mortgages was in direct conflict. Bearing in mind that the trial court had the advantage of seeing the witnesses and weighing their credibility at first hand, we cannot say that the findings of the trial court on these questions of notice were erroneous.

It is further contended by Nash (1) that the other mortgagees failed to show that their mortgages were given for a valuable consideration; (2) that they had actual notice of the existence of the Schwartz mortgage, or facts sufficient to put them upon inquiry and charged them with constructive notice thereof; and (3) that their agents had notice thereof, and for the above reasons the Schwartz mortgage should have been decreed to be a first lien on the premises. As to the other mortgages, which appear to be senior on the record, it was sufficient to make *prima facie* cases in their favor to show that such mortgages were given for money loaned, to introduce the notes and mortgages and proof of nonpayment thereof and of the recording of the mortgage, all of which was covered by stipulation at the trial that the consideration of these mortgages was money loaned to the defendants Barnard; and such stipulation disposes of Nash's contention that the mortgages were not given for a valuable consideration.

The insistence of appellant Nash that these mortgages were each and every one given for antecedent indebtedness is not sustained by any clear and convincing evidence; on the contrary, as to at least the Carlson Estate and Cooper mortgages, the evidence

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is quite convincing that a large part of the amounts included in the notes and mortgages given them were advanced at or about the time of the execution and delivery of the notes and mortgages. As to the Cowlitz County Bank, it is true that a large proportion of the amount for which the note and mortgage were given was antecedent indebtedness, and the note and mortgage were given for more than the amount then due in order to cover future advances which were agreed to be furnished by the bank to the Barnards, but it appears that at least \$3,250 was then and there an existing indebtedness of the Barnards to the bank, and that a further \$150 was advanced very shortly after the execution and delivery of the note and mortgage. These facts are sufficient to sustain the good faith and validity of the senior mortgages. Jones, Mortgages (7th ed.), § 111.

Upon the question of the actual notice of the existence of the Schwartz mortgage to the other mortgagees, appellant Nash had the affirmative of the issue and the burden of proof rested upon him, and it was necessary that his proof be clear and convincing to the effect that the mortgagees were given actual notice, or given notice of facts which would put them upon inquiry as to the existence of the Schwartz mortgage and the extent of the mortgage as a lien. This, not even the testimony of Mr. Moulton, who is the principal witness in support of the Schwartz mortgage, under all the attendant facts and circumstances, makes convincing, and, as we have said before, it is a question of fact in direct conflict, and the witnesses being necessarily only the interested parties in the matter, the court resolved the testimony in favor of the seniority of the mortgages as they appear of record, and these determinations we are not disposed to dis-

turb. We could not do so unless we could say the evidence preponderates the other way upon the question of notice, and this we cannot do.

III. Appellant Cowlitz County Bank appeals from all that part of the decree which directs the manner in which the proceeds realized from a sale of the property described in the decree shall be applied and the manner in which the respective judgments shall be satisfied out of the proceeds. It concedes that the Carlson Estate judgment should be a first lien upon an undivided three-fourths of the quarter-section, and entitled to be paid out of three-fourths of the proceeds from the sale of the property before the other judgment creditors. It contends, however, that, having a mortgage upon an undivided one-fourth interest, it should be paid out of that one-fourth, or out of one-fourth of the amount realized from the sale of the premises; provided, that the two prior mortgages have been paid, and that the decree should be corrected and modified so that the Cooper judgment shall be paid out of funds remaining after the Carlson Estate judgment has been paid out of three-fourths of the funds; if that is not sufficient, of course, the unpaid balance of the Cooper judgment should be paid out of one-fourth of the funds realized on the sale, and the judgment of appellant bank should be paid out of what remains of this one-fourth.

It is argued that the appellant bank, on taking its mortgage on the one-fourth interest, acquired an equity to have the Cooper mortgage on the whole tract paid first out of the residue remaining after the sale of the three-fourths interest covered by the Carlson Estate mortgage, leaving, so far as possible, the proceeds of the one-fourth interest for the payment of appellant bank's lien, and this right is not defeated nor

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impaired by the subsequent mortgage of the entire tract to Schwartz (Nash). We are of the opinion that the trial judge based his decision as to the rank of the bank's mortgage lien upon the undivided one-fourth interest of the quarter-section upon the facts which practically established it to be superior in rank to that of Schwartz (Nash). The executors of the Carlson estate, understanding that Moulton and Schwartz had some sort of interest in one-fourth of the land, took their mortgage upon an undivided three-fourths, leaving an undivided one-fourth of the real estate unmortgaged. Cooper took his mortgage as a second mortgage to the Carlson estate mortgage, but upon the whole quarter-section, thus making it a prior incumbrance on the remaining undivided one-fourth of the premises. The officers of the bank took its mortgage upon the undivided one-fourth of the quarter-section. As was said before in discussing the other appeals, the evidence as to the consideration for the bank's mortgage as a present indebtedness was not very strong, but probably established *prima facie* a valid consideration as against the incumbrancers, and the debtor did not dispute the indebtedness nor the validity of the mortgage. There was evidence that \$150 was advanced shortly after the execution and delivery of the mortgage. Cooper's mortgage was undoubtedly senior to the bank's mortgage because recorded first and without any notice of the bank's mortgage dated the day previously, and Cooper's mortgage was undoubtedly prior and superior to the bank's mortgage, and although the bank had a mortgage upon an undivided one-fourth of the quarter-section, it could not be satisfied out of the proceeds of the sale as to that one-fourth because Cooper had a prior lien upon all the quarter-section after the satisfaction of the Carl-

son Estate mortgage. The Schwartz (Nash) mortgage is not given priority over the bank's mortgage, for it is provided that Nash "shall be paid out of the proceeds of the sale of the premises as shall remain after the judgment in favor of plaintiff and in favor of the defendant John Cooper and defendant Cowlitz County Bank has been satisfied as above set forth". There is no just reason for apportioning the proceeds of the sale otherwise than as described.

The appellants Barnard, having recovered a more favorable judgment against appellant Nash, are entitled to the costs of their appeal against Nash. Respondents Watson and Cooper are entitled to their costs of appeal against defendant Nash. Appellant Cowlitz County Bank will recover no costs.

With the exception of the modification as to attorney's fees decreed to appellant Nash, the decrees are affirmed.

MOUNT, PARKER, and MAIN, JJ., concur.

FULLERTON, J. (dissenting)—I am satisfied from the evidence that two of the mortgages were given to secure antecedent debts, and at least one of the mortgage creditors had notice of the prior unrecorded mortgage. For these reasons, I cannot concur in the conclusion reached by the majority.

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[No. 14965. Department Two. February 13, 1919.]

*In the Matter of the Estate of JAMES M. HAGERTY.*¹

EXECUTORS AND ADMINISTRATORS (169)—SETTLEMENT OF ACCOUNT EFFECT—CONCLUSIVENESS. The settlement of the final account of executors fixing their compensation by an order that was a final judicial determination of the amount on hand under their joint control is not *per se* conclusive as to their joint liability for the future acts of one of them, resulting in loss of a portion of the property.

SAME (47)—JOINT OR SEVERAL LIABILITY—ACTS OF COEXECUTOR. An executor is not liable for the acts or defaults of his coexecutor unless he has aided, concurred in, or contributed thereto; and an executor will not be held negligent in allowing his coexecutor to so deposit funds in a bank that he could draw them out, where the testator had expressed confidence in the executors, who were to act without bond, and where he was led to believe that it required their joint check to withdraw the funds, and such had been their practice over a long term of years.

SAME—FAILURE TO INVEST FUNDS—INTEREST. It is not an abuse of discretion to refuse to charge an executor with interest upon funds remaining in his hands from the time of the settlement of his account until the settlement of a supplemental final account pending an appeal, where it could not be foreseen how long it would be and the funds did not earn interest.

Appeal from a judgment of the superior court for Okanogan county, Neal, J., entered April 22, 1918, approving the final account of an executor, after a hearing upon objection before the court. Affirmed.

George F. Hannan (Kronshage, McGovern & Hannan, of counsel), for appellants.

W. C. Gresham, for respondent.

PARKER, J.—This is an appeal by Helena, Jean, and Florence Hagerty, residuary legatees under the last will and testament of James M. Hagerty, deceased, from the decree of the superior court for Okanogan

¹Reported in 178 Pac. 644.

county, settling the supplemental final account of Monroe Harmon, one of the executors named in the will. The main controversy here is over the refusal of the superior court to charge Harmon, as executor, with the sum of \$2,470, being the amount of funds belonging to the estate appropriated by one of his coexecutors.

In April, 1905, James Hagerty made his last will and testament, naming appellants residuary legatees thereunder. L. L. Work, Monroe Harmon, and S. P. Ecki were named in the will as executors thereof, without bonds, and were by the terms of the will given large discretionary powers in the control, management, and settlement of the estate. By the terms of the will, it was contemplated that the duties of the executors would extend over a period of ten years or more before final settlement and distribution of the estate should take place. James M. Hagerty was at that time interested in mining and other properties in Okanogan county, which he was developing, and which he manifestly considered would be of much greater value in the future by management and development along the lines he was pursuing with reference thereto. He evidenced his wish in this respect in part as follows:

"I further desire the executors to pursue as near as possible the same policy towards the promotion and development of the properties I am interested in at the time of my death, which they know I have followed, and to use any moneys in their hands from whatever source it has arisen to protect the interest of the properties and of the other stockholders, the same as I have always done, and such properties as are not incorporated in a stock company, I would advise that it be done as soon as the properties are to be developed and wherever possible, that a majority of the capital stock be retained in the estate. I desire that my homestead shall not be placed on the market as a townsite

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until such time as it is necessary in the development of the properties."

He also expressed in the will his "absolute confidence in these men named as executors, both as to their honor and ability to handle this trust." We notice these provisions of the will to the end that its spirit and the nature and extent of the confidence reposed by the testator in the named executors may be made plain.

James M. Hagerty died a few months following the making of this will, and thereafter, in September, 1905, the will was duly admitted to probate in the superior court for Okanogan county when the executors duly qualified as such and entered upon the discharge of their trust. The management of the estate fell largely into the hands of executors Work and Harmon, Ecki being a nonresident of this state. For present purposes we may regard Work and Harmon as having entire charge of the estate. In October, 1916, Work and Harmon filed a joint final account of their doings as executors, looking to the final settlement of the estate, showing that there was then on hand funds belonging to the estate amounting to \$10,476, the possession of which, so far as appeared from the joint account, was the joint possession of the executors. Thereafter, upon due notice and hearing, that account was by the superior court approved by its order entered on December 13, 1916. Thereafter, in August, 1917, upon appeal to this court, that order was modified in so far as it determined the compensation of the executors (*In re Estate of Hagerty*, 97 Wash. 491, 166 Pac. 1139), when it was determined that the executors were entitled to no greater compensation than the amount of the funds of the estate already received by them as compensation. The larger part

of the \$10,476, so reported and found by the court to be in the hands of the executors, was on deposit in the Commercial Bank of Okanogan, in the name of "Executors of Estate of James M. Hagerty, Deceased, L. L. Work." The deposit being so credited upon the books of the bank, it is conceded that Work was enabled to draw and pay out money therefrom by checks signed by himself alone, without having Harmon join in the signing of such checks. Work is an experienced banker and accountant. While Harmon is a man of business experience, he is not an accountant. So, by common consent, the keeping of the accounts and attending to the banking of the estate's funds was done by Work, while the attention of Harmon was directed to other things to be done in the management of the estate. Harmon was led by Work to believe that all funds of the estate deposited in the several banks with which they did business as executors from time to time were deposited in both of their names as executors, so that such funds could not be paid out except upon checks signed by both of them. From time to time during practically the whole of the eleven years covered by the management of the estate by Work and Harmon, prior to the settlement of their joint account, there had been paid out of the funds of the estate so deposited in the several banks, sums aggregating many thousands of dollars, upon more than a thousand checks, signed by both executors; and the evidence leads us to conclude, as it evidently did the trial court, that no money was ever drawn from these several deposits other than by checks so signed by both executors, until after the filing and settling of their joint account by the superior court on December 13, 1916.

Thereafter, on December 14, 1916, Work drew from the estate's deposit account with the Commercial Bank,

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upon a check signed by himself alone, the sum of \$2,470. This was done without the knowledge or consent of Harmon. All of the estate's money on deposit in the Commercial Bank was the proceeds of a sale of certain shares of stock belonging to the estate, the deposit being made early in the summer of 1916. Harmon did not receive the money so deposited, and never had it in his possession or control, though he believed it was under the joint control of himself and Work after being deposited in the Commercial Bank. This money was, in effect, collected by Work upon the consummation of the sale of the shares of stock. That is, he caused the Commercial Bank to receive a credit therefor in a Spokane bank, and the Commercial Bank in turn to credit the estate therefor as a deposit in the manner above noticed. From the time this deposit was so made in the Commercial Bank, up until the filing and settlement of their joint account in the superior court, many checks were drawn against it, signed by both Work and Harmon, as executors, such checks being so drawn and honored in due course in the conduct of the business of the estate, as had been done theretofore with respect to deposits of the estate's funds in other banks. It was the custom of Work to write the checks, sign them, and then present them to Harmon for his signature, Harmon at all times resting in the belief that all the deposits, including this one, were subject to be drawn upon only by checks signed by both of them.

Work drew from the funds of the estate on deposit in the Commercial Bank the \$2,470, believing that he was entitled to that sum as his share of the compensation awarded by the superior court to the executors. Had the award of compensation so made by the superior court not been appealed from and modified by

this court, we may assume that Work would have been entitled to that amount of compensation in addition to the amount he had theretofore received. But by the modification of that order in this court it was finally determined that Work was not entitled to that or any other sum as compensation, in addition to what he had already received. We note that, while the order of the superior court approving their joint account and awarding them compensation was promptly appealed from by these same appellants, there was no attempt by appellants to in any manner supersede or stay the effect of that order.

During the afternoon or evening of December 14, 1916, the day on which Work drew the money from the estate's Commercial Bank deposit, Harmon learned of that fact and made inquiry of Work why he drew the money out, and by what authority he was able to have the bank honor his check without the signature of both executors thereon. Work then informed Harmon the manner in which the deposit had been made, enabling him to draw money thereon without the signature of both executors, and also informed Harmon that he did not want to have Harmon rendered responsible for his taking of the money. They then had some controversy as to the propriety of Work's act in taking the money, in view of the possible reversal of the superior court's order awarding them compensation, Harmon protesting that Work should have left the money in the bank until the amount of their compensation was finally disposed of upon appeal to this court, should such appeal be perfected. Their talk did not, however, result in Work returning the money at that time. When it became apparent to Harmon that Work was not going to return the money to the estate, a check was drawn against the deposit, signed

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by both of them, in favor of Harmon for \$1,000, to apply on his portion of the compensation awarded by the superior court, which amount, it is apparent, Harmon would have been entitled to had not the award of compensation made by the superior court been modified by this court. Thereafter, upon the modification of that award by this court, Harmon promptly returned the \$1,000 received by him to the funds of the estate. Work has never returned to the funds of the estate any portion of the \$2,470 so taken by him.

At the time Work drew this money, he was closing up his affairs in this state with a view of removing therefrom, and on the day following he went away, going to New Jersey, where he has since resided. Before going away, he gave Harmon written authority to draw all the money of the estate then on deposit in banks. In March, 1918, Harmon filed a supplemental final account and petition for distribution, reporting his doings as executor since the filing of the joint account by himself and Work, setting forth the facts relative to the taking of the \$2,470 by Work, after the settlement of their joint account, praying that his account be approved, that he be not charged with the \$2,470 taken by Work, and that the remaining property of the estate be distributed to those entitled to it under the will. Appellants filed their exceptions to this account, asking that Harmon be charged with the \$2,470 taken by Work, insisting that he was jointly liable with Work therefor. These exceptions to Harmon's supplemental account were overruled by the superior court, upon the theory that, under the facts shown, Harmon was not liable for the money so taken by Work. This is the principal question presented upon this appeal.

It is first contended in behalf of appellants that the order of the superior court of December 13, 1916, ap-

proving the joint final account of Work and Harmon, became in effect *res judicata* as a final determination adjudging them to be jointly liable for all funds and property of the estate appearing by their joint final account to be on hand. This contention is rested upon our decisions in *In re Doane's Estate*, 64 Wash. 303, 116 Pac. 847; *Krohn v. Hirsch*, 81 Wash. 222, 142 Pac. 647, and *Davis v. Seavey*, 95 Wash. 57, 163 Pac. 35, Ann. Cas. 1918D 314, holding in substance, that orders, judgments, and decrees rendered in probate proceedings, settling final accounts, or making distribution of the estates of deceased persons, rendered upon due notice, have the same force and effect as other final judgments. It may be here conceded, for argument's sake, that the order settling the final joint account of Work and Harmon was a final judicial determination as to the amount of property and funds of the estate then on hand and under the joint control of both executors. But we think it does not follow from such view of the finality of the order of settlement that each executor would be, by virtue of that order of settlement, conclusively rendered liable for the future acts of the other, resulting in loss of some portion of the property or funds of the estate so determined to be then on hand and under the joint control of both executors. It was held by the court of errors and appeals of New Jersey, in a well considered opinion, that the fact that administrators or executors have filed a final account, and that a certain balance has been adjudged by the orphan's court to be due thereon, is not *per se* conclusive evidence as to their joint liability for the amount so settled. *Weyman v. Thompson*, 52 N. J. Eq. 263, 29 Atl. 685, 30 Atl. 249.

We are not, however, here concerned with the question of the joint liability, or the liability of one of the

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executors for the act of the other, prior to or at the time of the settlement of their joint account; since the act of Work in taking the \$2,470, resulting in loss to the estate, occurred after the filing and settlement of their joint account. We are of the opinion that that order is, in no event, such a final adjudication as to conclusively render Harmon liable for the act of Work in thereafter drawing from the deposit the \$2,470, upon a check signed by himself alone as executor, the day following the entry of that order of settlement. Since Harmon was in good faith relying upon his justified belief that the funds of the estate were under the joint control of himself and Work at the time of rendering their joint account, he was thereafter in substantially the same position, as to his liability, as if Work had thereafter caused their joint control to be transferred to his separate control and then taken the money; the question thus becoming one as to the fault of Harmon in allowing Work to obtain such separate control as to enable him to take the money.

The courts of this country seem to be in irreconcilable conflict of opinion upon the question of when an executor becomes liable for the acts of his coexecutor, resulting in loss to the estate. In his concluding observations made in an exhaustive note appended to *Cheever v. Ellis*, 11 L. R. A. (N. S.) 297, the learned editor says, at page 349:

“It was stated in a case considered in this note that no other subject has produced so much judicial disagreement. So true is this statement that perhaps even now very little of the law involved can be said to be settled law.”

It seems to us that the general rule of law here applicable is well stated by the learned editor of that note, near the introduction thereof (p. 298), as follows:

"It is a general, if not a universal, rule, that an executor or administrator is not liable for the acts, defaults, or devastavits of his coexecutors or coadministrators, unless he has in some manner aided, concurred in, or contributed to them."

The difficulty arises in the application of this general rule to facts attending particular cases to be determined, and this is wherein is found the seemingly irreconcilable conflict in the opinions of the courts. It seems to us that, while recognizing the general rule to be as stated in the last above quotation, each case is largely dependent upon its own peculiar facts and circumstances, taking into consideration the nature of the duties to be performed by those who are called upon to administer the estate, and the extent of the trust and confidence reposed by the testator in those to whom he has confided the administration of his estate.

Wherein did Harmon fail in the duty confided to him by the terms of the will? That he did no affirmative act resulting in Work taking the \$2,470, is beyond question. So it becomes a question of whether or not he has failed to do something looking to the prevention of Work taking this money from the funds of the estate. Manifestly he has not so failed in his duty, unless it be held that he negligently allowed Work to obtain such control over the deposit in the Commercial Bank as to enable him to draw money therefrom by a check signed by himself alone.

It seems to us that these are the pertinent and controlling facts and considerations furnishing the correct answer to this question: (1) The deceased, by the terms of his will, vested large discretion in these executors in the management of the estate. (2) He exonerated them from giving bonds to secure the faithful performance of their duties. (3) He took

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particular pains to express in his will "absolute confidence in these men named as executors, both as to their honor and ability to handle this trust." (4) Harmon was by Work led to believe that the deposit credit which Work had caused to be given the estate in the Commercial Bank was so given and entered upon the books of the bank that it could be paid out only upon checks signed by both of them. (5) This belief on the part of Harmon was the result of the manner in which other funds of the estate had been deposited and paid out, and the manner in which all money had been paid out of this deposit prior to the time of the settlement of their joint account. These facts, it seems to us, render it plain that the deceased did not expect or intend that these executors should deal with each other at arm's length, in the sense that their possession and control of the property and funds of the estate should be at all times an absolute joint possession and control in the sense that one should not repose any confidence or trust in the other; that, when Harmon entrusted to Work the making of deposits of the estate's funds in banks, he was not reposing any greater degree of trust and confidence in Work than the deceased himself did and intended should be reposed in one by the other in the management of the estate's affairs; that Harmon did all that a reasonably cautious business man would have done under the circumstances looking to a joint control of the estate's funds on deposit in banks; that Harmon was fully justified, by the course of conduct of Work, as he was led to view it, in assuming that the funds of the estate deposited in the Commercial, as well as other banks, were so made that the money could not be paid therefrom except upon checks signed by both of them; and that Harmon was not negligent in his duties as

executor in failing to discover the authority of Work, as between Work and the Commercial Bank, to check against the deposit therein without obtaining the signature upon such checks of Harmon. We deem it unnecessary to here review the numerous decisions of the courts dealing with the question of the liability of one executor for the acts of his coexecutor resulting in loss to the estate. Such a review would be but to confirm the view of the learned editor of the note in 11 L. R. A. (N. S.) 297, 349, above quoted from, to the effect that there is great conflict of judicial opinion in the application of the law to cases of this nature. We, however, note the following authorities, which we think lend support to the conclusion we here reach: *Peter v. Beverly*, 10 Pet. (U. S.) 532; *Irwin's Appeal*, 35 Pa. St. 294; *Lightcap's Appeal*, 95 Pa. St. 455; *Paulding v. Sharkey*, 88 N. Y. 432; *Bruen v. Gillet*, 115 N. Y. 10, 21 N. E. 676, 12 Am. St. 764, 4 L. R. A. 529; 11 R. C. L., pp. 409-411. We conclude that the trial court did not err in refusing to charge Harmon with the \$2,470 taken from the funds of the estate by his coexecutor Work.

Some further contention is made in behalf of appellants that Harmon should be charged, as executor, with interest upon funds of the estate remaining in his hands from the time of the settlement of his and Work's joint final account until the settlement of his supplemental final account. We think it sufficient to say in answer to this contention that, while Harmon did have in his hands a considerable sum which was not yielding interest or income during that period, it is apparent that he could not foresee with any degree of certainty how long it would be before he would be compelled to pay out such funds upon distribution. During that time matters were pending which had to

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be disposed of before final distribution, the final disposition of which was uncertain as to time. We think the superior court did not abuse its discretion in refusing to hold that Harmon should have invested the funds during that time so as to yield interest.

The decree appealed from is affirmed.

MOUNT, FULLERTON, MAIN, and HOLCOMB, JJ., concur.

[No. 15053. Department Two. February 13, 1919.]

WILLIAM HURLEY *et al.*, *Appellants*, v.

CORDELIA LINDSAY *et al.*,

Respondents.¹

FRAUD (8, 22)—PURCHASER OF LAND—DEFICIENCY IN ACREAGE—EVIDENCE—SUFFICIENCY. Findings that purchasers were not misled to their prejudice by false representations that a tract of land contained twenty acres, are sustained, where the tract was in compact form, its boundaries all in view and pointed out, and the purchasers twice inspected the boundaries and expressed doubt as to the area, but finally accepted deed referring to the land as twenty acres more or less, in view of a dispute in the evidence as to the representations made and the rule that the burden was upon them to show the fraud by clear and convincing evidence.

Appeal from a judgment of the superior court for Clarke county, Mackintosh, J., entered April 3, 1918, upon findings in favor of the defendants, in an action for damages for fraud, tried to the court. Affirmed.

McMaster, Hall & Drowley, for appellants.

Miller & Wilkinson, for respondents.

PARKER, J.—This is an action to recover damages. It is grounded upon alleged false statements made by and on behalf of defendants Cordelia Lindsay and her husband as to the number of acres in their farm, in-

¹Reported in 178 Pac. 626.

ducing plaintiffs Hurley and wife to purchase it. Trial in the superior court sitting without a jury, resulted in findings and judgment denying to plaintiffs any recovery, from which they have appealed to this court. The alleged false statement relied upon by the Hurleys as inducing them to purchase the farm was that it contained twenty acres, when, in fact, it contained but fifteen and three-quarter acres.

At the time of the sale in question, Mrs. Lindsay was the separate owner of the land, her husband having no legal interest in the title thereto. They lived upon and cultivated it as a farm. It lies in a compact body, its width being about one-third less than its extreme length. Its north, west, and south boundaries are straight lines, joining at right-angles at the northwest and southwest corners, while its easterly boundary is a county road running in a general north-easterly and southwesterly direction. It is comparatively level, and from near the house and barn one can see all over it, save as to a very small part in a depression where there is a spring. In March, 1917, a real estate agent, who had been authorized by the Lindsays to find a purchaser for the farm, brought the Hurleys there and introduced them to Mr. Lindsay, Mrs. Lindsay not then being there. They were shown over the land by Mr. Lindsay, who, it is admitted, correctly pointed out to them the boundaries of the land. They quite thoroughly looked over the farm, and became well informed as to the location of its boundaries upon the ground. At that time one, and possibly both of the Hurleys, remarked that the tract looked small for twenty acres. They were farmers of many years' experience. They then went away, expressing themselves as not sufficiently satisfied as yet to purchase the place. About a week later they

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returned, looked over the place to about the same extent as on the previous visit, and again expressed their doubts as to its containing twenty acres. They then agreed to purchase the place for \$3,500. A deed to the land was soon thereafter executed and caused to be delivered to the Hurleys by Mrs. Lindsay, her husband joining therein, when the \$3,500 was paid therefor, and the Hurleys entered into possession of the land. The deed contained an expressed consideration of ten dollars. There is some evidence indicating that the purchase price of \$3,500 was not only for the land, but for some additional personal property, though the record is not clear upon this question. The land was described in the deed, corresponding strictly with the boundaries pointed out upon the ground by Mr. Lindsay to the Hurleys, as follows:

“Beginning at the quarter corner between sections fifteen (15) and twenty-two (22) in township three (3) north of range two (2) east of the Willamette Meridian, and running thence south ten and seventy-five hundredths (10.75) chains; thence east eight and thirty hundredths (8.30) chains to the center of the county road; thence in a northeasterly direction along the center of the county road to the north line of said section twenty-two (22); thence west along the north line of said section twenty-two (22) to the point of beginning, containing twenty acres of land, more or less.”

Common repute seems to have indicated at that time that the farm contained twenty acres; but upon a survey of it thereafter, caused to be made by the Lindsays, it was found to contain but fifteen and three-quarter acres.

Before the sale, the place had been listed by the Lindsays with the agent for sale, referring to it in the agency agreement as twenty acres. There is some

testimony indicating that the agent stated to the Hurleys that the place contained twenty acres, but plainly so stated his understanding only as he had acquired it from the listing of the place with him for sale by the Lindsays, he so informing the Hurleys. We think it is plain that any such statement made by the agent was not relied upon by the Hurleys, since they thereafter talked directly with Mr. Lindsay upon this subject during both of their visits to the place before purchasing it. The evidence is in conflict as to what Mr. Lindsay said to them during those visits about the number of acres in the farm. The Hurleys testified that, when they visited the place, they expressed doubts as to its containing twenty acres, and that Mr. Lindsay then assured them that it did contain that number of acres, and that they would not have purchased it but for such assurance. Mr. Lindsay testified positively that, when they expressed doubt as to the place containing twenty acres, he said in reply thereto: "It always looked small to me, but I never had it surveyed and the deed called for twenty acres more or less"; and that he never stated to them otherwise touching the question of the number of acres in the place. This is in substance all of the evidence we have touching the question of statements made by either of the Lindsays, or in their behalf, to the Hurleys as to the number of acres in the farm. Mr. Lindsay first met the Hurleys when they visited the place with a view of purchasing it; and Mrs. Lindsay did not meet them until after the sale was consummated and the deed delivered to them.

Having in mind that, up to the time of entering into negotiations between the Lindsays and the Hurleys looking to a sale of the place, they were entire strangers to each other, and were dealing at arm's

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length; that the Hurleys, before purchasing the land, twice visited and thoroughly inspected it and became well acquainted with the location of its boundary lines upon the ground; that the land lies comparatively level, in a fairly compact body, and is capable of being viewed all over from near the house and barn; that the description in the deed accepted by the Hurleys is by metes and bounds, conforming strictly to those pointed out to the Hurleys by Mr. Lindsay upon the ground, and concludes with the words "twenty acres of land more or less;" and that deceit and false representations and reliance thereon, such as are here invoked by the Hurleys, must be established by clear and convincing evidence to entitle them to recover, with the burden of proof resting upon them, we feel constrained to agree with the conclusion reached by the trial court, that the Hurleys were not misled to their prejudice in reliance upon any statement made by or in behalf of the Lindsays as to the number of acres in the farm. Our decision in *Conta v. Corgiat*, 74 Wash. 28, 132 Pac. 746, supports this conclusion.

The judgment is affirmed.

MAIN, HOLCOMB, MOUNT, and FULLERTON, JJ., concur.

[No. 15103. Department One. February 13, 1919.]

R. H. WEGENER, as *Wegener Manufacturing Company*,
Respondent, v. CHARLES R. PETERSON *et al.*,
Appellants.¹

PRINCIPAL AND AGENT (58)—RATIFICATION IN GENERAL. There was sufficient evidence that an agent's contract was made in behalf of a partnership where the partners ratified what he had done.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered April 25, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Lyle & Henderson, for appellants.

A. O. Burmeister and J. H. Gordon, for respondent.

MACKINTOSH, J.—The appellants in defending this suit, brought against them for the value of labor and material used by the respondent in the erection of a building for them, assert that the contract for the erection of the building was not theirs, but the contract of one Teeter, and that they being partners in a nontrading enterprise, the burden was upon respondent to show that Teeter was their agent, and to show that he had express authority to bind them. As we read the testimony, there was more than sufficient evidence to have satisfied the jury that Teeter was acting in behalf of the partnership, and that the appellant Peterson, before the construction of the building was commenced, ratified all the acts theretofore done by Teeter, and he himself performed acts and made statements that were sufficient to have bound the partnership, and that the appellant Cooksie, during the progress of the work, by his acts and conduct ratified all

¹Reported in 178 Pac. 687.

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that had theretofore been done. The jury was properly instructed upon the question of agency. We find no merit in the other assignments of error.

The judgment is affirmed.

CHADWICK, C. J., MITCHELL, MAIN, and TOLMAN, JJ.,
concur.

[No. 15135. Department One. February 13, 1919.]

GEORGE C. BRATT, *Appellant*, v. C. L. POOLE *et al.*,
Respondents.¹

BAILMENT (3, 8)—ACTIONS—DAMAGES—DEFENSES. Under a lease of a donkey engine requiring the lessees to accept it in its present condition and return it in as good condition, plus any betterments that might be placed upon it, it is inadmissible, in defense of an action for rent and damages, to show the lessees' cost of repairs and betterments, and that they discarded it because too expensive to keep up.

Appeal by plaintiff from a judgment of the superior court for Pierce county, Card, J., entered March 30, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages and for the rental of a donkey engine. Reversed.

Peer & Eisenhower, for appellant.

Ralph Woods, for respondents.

TOLMAN, J.—In January, 1916, appellant leased to respondent Poole and one Powell a donkey engine for use in logging operations. The lease was in writing, duly signed, the term was seven months, and the lessees were bound to accept the engine "in present condition," to pay a rental of \$75 per month in advance, and to return the engine, within ten days after the termination of the lease, to any place designated by

¹Reported in 178 Pac. 638.

lessor within fifty miles of the city of Tacoma "in as good order and condition as the same is now, or may be put into (reasonable use and wear thereof excepted)." It is admitted that, after the expiration of the term described in the written lease, it was orally agreed that respondents should continue to keep possession of and use the engine, under the terms of the written lease, for a further period. Appellant contends that respondents so continued to hold and use the engine, and did not return it to him in Tacoma until July 17, 1917, at which time the engine was, according to appellant's theory, returned in very bad condition, with numerous vital parts missing or broken, all the way from the grates and ash pan up to the spark arrester, and with the rental accruing after November, 1916, wholly unpaid; while respondents contend that they finished using the engine on December 12, 1916, so notified appellant or his agent, asked for directions for its return, and were requested to leave the engine in the woods until called for, as appellant had a prospective purchaser for it who was operating in the vicinity where the engine then was.

Whatever demands or requests were or were not made for the payment of the rental, or for the return of the engine prior thereto, it seems to be admitted that the return of the engine was demanded in June, 1917, and that the delivery in July was in response to appellant's requests or orders. The engine was shipped to Tacoma by rail, loaded on a flat car. It stood on the car in the Tacoma yards for some days, where it was seen by appellant and his agent, was finally unloaded at respondents' expense at the place designated by appellant, and some time thereafter appellant appears to have called respondents' attention to some missing parts, whereupon respondent

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Poole replied that some parts had been taken off and boxed for shipment, which parts he would endeavor to locate and return. Some weeks or months after the return of the engine, appellant, in proceeding to put the engine in condition for sale or further use, claims to have discovered, by means of skilled workmen who examined it with a view to making repairs, that it would cost \$731.57 to supply the parts which are claimed to have been missing or broken and to put the engine in condition to be used, and failing to obtain an adjustment with respondents, this action was brought to recover \$525 rental, claimed to have accrued for the months from December, 1916, to June, 1917, both inclusive, and for damages to the engine beyond ordinary wear and tear in the amount claimed necessary to make the repairs, as hereinabove stated.

Answering the complaint, respondents denied the allegations as to damaging the engine and as to the missing parts, except some small items aggregating \$25.50 in value, which sum, with accrued costs, was tendered and brought into court; and also pleaded that their use of the engine ceased on December 12, 1916, except for one week at a later period, when they used it with appellant's consent and paid for such use, that the rental had been fully paid for the time that the engine had been in use, and that it remained in their possession thereafter at the request of appellant; that, during such time, they were gratuitous bailees only and held the property for the sole benefit of appellant, the bailor. The case was tried to a jury, which brought in a verdict for the amount tendered only, and a judgment was entered thereon, from which this appeal is taken.

Appellant assigns a number of errors, only one of which we deem it necessary to discuss at any length.

When respondent C. L. Poole was on the witness stand, and after he had testified that, when he received the engine, it was apparently all right, but that they had continual trouble with it all the time they were using it, he was asked by his counsel: "Q. How much did you expend on it trying to keep it in shape?" To which an objection was interposed. The court, apparently misunderstanding the question, said:

"Of course the amount is immaterial, but that they gave it care, I think it bears on that. He may answer."

Then followed testimony in which, after refreshing his recollection by looking over bills and memoranda, the witness was permitted to say to the jury, not only that he had purchased various parts to be put on the engine while it was being operated under the lease, but that he had expended between three and four hundred dollars in purchasing such parts, and, in addition, had incurred a large and indefinite expense for labor and extra time of men employed after working hours and on Sundays in repairing the engine, and that finally he had discarded its further use because it was too expensive to keep up.

The rights of bailor and bailee are controlled by the written contract, where one exists, and they may impose upon each other any terms they may choose. 6 C. J. 1110. The bailee is liable upon an express covenant of a written contract to return the property in good condition, or as it was at the time of hiring. 6 C. J. 1112; *Robertson v. Plymouth Lum. Co.*, 165 N. C. 4, 80 S. E. 894; *Direct Nav. Co. v. Davidson*, 32 Tex. Civ. App. 492, 74 S. W. 790.

Respondents had, by their written agreement, accepted the engine "in present condition," which condition they were bound to know when they executed

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the lease and received the property thereunder; and they were thereby bound to return it in as good condition as when received, plus any betterments they might place upon it, "reasonable use and wear thereof excepted." While testimony generally, to the effect that the engine was kept in repair while being used by respondents, might be admitted as bearing upon its condition upon December 12, 1916, in the event the jury should find that the lease ceased on that day and that respondents were in possession thereafter only at appellant's request and for his benefit, we cannot conceive of any theory upon which the cost of such repairs should be detailed to the jury, or the jury told that the further use of the engine was discarded because the machine was too expensive to keep up. It is obvious that such testimony would almost certainly tend to prejudice the jury against appellant's claim for damages to the engine, and the extent to which the evidence referred to is reflected in the verdict, we cannot now determine. The only issue upon this branch of the case was, what was the condition of the engine when the lease began, and what was its condition when it ended? The testimony complained of had no tendency to establish either. The trial court had the true rule in mind when he said: "Of course the amount is immaterial, but that they gave it care . . .," and should have limited the testimony on this point to general evidence tending to show only that the engine was kept in repair and was in such repair when the lessees' use of it ceased; and, of course, should not have permitted the witness to testify as to his reason for discontinuing its use, as that evidence tended directly toward overturning the express terms of the written contract, or inviting the jury to disregard those terms.

The court properly instructed the jury, and the so-called inconsistencies complained of resulted from the necessity of instructing as to the law applicable to the facts as contended for by each of the parties, which contentions, of course, are inconsistent with each other.

As our conclusion upon the point discussed requires a reversal of the case, the other errors assigned need not be referred to, further than to say that the conduct of counsel in addressing the jury, upon which error is assigned, is not likely to occur upon another trial, and therefore has not been considered.

The judgment appealed from will be reversed, and the cause remanded with instructions to grant a new trial.

CHADWICK, C. J., MAIN, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 14852. Department Two. February 14, 1919.]

S. RAYBURN *et al.*, Respondents, v. STEWART-CALVERT COMPANY, Appellant.¹

LANDLORD AND TENANT (36)—PURCHASE BY TENANT—MERGER OF ESTATES. Where a contract for the purchase of mining claims expressly provided that it was subject to a lease which required payment of royalties for a two-year term, consummation of the contract by the lessee to whom it had been assigned does not merge the lease, or dispense with the payment of royalties during the term.

Appeal from a judgment of the superior court for Okanogan county, Truax, J., entered January 8, 1918, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Affirmed.

J. H. Templeton and *P. D. Smith*, for appellant.

Mulligan & Bardsley and *E. A. Williams*, for respondents.

¹Reported in 178 Pac. 454.

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Opinion Per MOUNT, J.

MOUNT, J.—This action was brought to recover \$2,901, alleged to be due the plaintiffs for royalties or rent upon two mining claims. After issues joined, the case was tried to the court without a jury, and resulted in a judgment in favor of the plaintiffs for the amount claimed. The defendant has appealed.

The facts are as follows: On August 7, 1915, the respondents, being the owners of two certain mining claims in Okanogan county, leased these claims to one H. B. Brown for the purpose of taking sulphate of magnesia therefrom. The lease was written and provided that Mr. Brown should extract sulphate of magnesia from these claims, and that for every ton of sulphate of magnesia taken therefrom he was to pay a royalty of \$2. At the time this lease was entered into, the title to these mining claims had not been acquired from the United States. The lessors simply had the right of possession. It was agreed that the lease should in nowise interfere with the right of the respondents to obtain title from the government. It was also agreed in the lease that, in case the lessee failed to comply with the terms of the lease, the lessors might, if they so elected, terminate the contract and all rights of the lessee thereunder. Mr. Brown took possession of the mining claims and proceeded to extract sulphate of magnesia therefrom. He afterwards assigned the lease, and the Stewart-Calvert Company, with the consent of the original lessors, took possession of the claims and proceeded to take magnesium sulphate therefrom under the terms of the lease. Thereafter, on November the 13th, 1915, W. H. Stewart entered into a contract with the respondents to purchase the two mining claims for a consideration of \$8,000. The contract was in writing and provided, among other things, that Mr. Stewart would place

\$1,000, within ten days from the date of the contract, with a copy of the contract, in the First National Bank of Oroville, Washington, to be held by that bank until the respondents should deliver a patent and warranty deed of the property to the bank; that, upon the delivery of the patent and deed, the bank should then deliver the \$1,000 deposited, and thereafter \$7,000 should be paid in installments; and that, when the installments were fully paid, the bank should deliver the patent and deed to Mr. Stewart. It was also provided that Mr. Stewart should have the right and privilege to pay all of the deferred payments prior to the maturity thereof. The contract then provided as follows:

“It is further agreed and understood by and between the parties hereto that this option and agreement or the consummation of this agreement shall in nowise affect that certain lease and agreement made by and between W. C. Hancock, G. M. Rayburn and S. Rayburn, parties of the first part, and H. B. Brown, party of the second part, which said agreement was made on the 7th day of August, 1915, and concerning the property described herein, and which said agreement and lease is now in full force and effect, and is now owned by the Stewart-Calvert Company, a corporation, and this option and agreement is made subject to the aforesaid lease and agreement. It is further agreed and understood that time is the essence of this agreement.”

Thereafter, on the 16th day of November, 1916, in pursuance of the contract of purchase, Mr. Stewart deposited with the First National Bank of Oroville, for the use and benefit of the respondents, the sum of \$1,000, together with a copy of the contract of purchase; and on the 28th day of July, 1916, Mr. Stewart assigned his contract of purchase to the Stewart-Calvert Company, and on the same day the Stewart-Calvert Company, in accordance with the contract made

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between the respondents and Mr. Stewart, deposited with the bank, for the use and benefit of the respondents, the sum of \$7,000, being the full purchase price on the mines. On the day the whole purchase price was deposited with the bank, Mr. Stewart, by letter, notified the respondents that the full purchase price agreed upon had been deposited with the bank subject to their order, upon delivery to the bank of a deed and a United States patent. On the same day, the bank notified the respondents that the full purchase price of the mines had been deposited to be paid by the bank to respondents upon the delivery of a deed and a United States patent for the mining property. The respondents did not execute a deed, and the money thereafter remained in the bank subject to the order of the respondents upon complying with the terms of the contract of sale. After the money was deposited by the appellant in the bank as stated, the appellant refused to pay royalties under the lease, and this action was brought, on March 29, 1917, to recover the royalties alleged to be due at that time, viz., \$2,901.

The appellant takes the position that, after it had purchased the mining claims and paid the full consideration into the bank in accordance with the written contract of purchase, it was holding the mining claims as owner and not as lessee. It relies upon the rule that the purchase by the lessee of the interest of the lessor during the existence of the lease merges the two estates, and argues that the original lease executed by the lessors became merged into the contract of sale at the date of the payment of the purchase price by the lessee. This is ordinarily the rule, but in this case the contract of purchase expressly recites that

“The consummation of this agreement shall in no-wise affect that certain lease and agreement made by

and between W. C. Hancock, G. M. Rayburn and S. Rayburn, parties of the first part, and H. B. Brown, party of the second part, which said agreement was made on the 7th day of August, 1915, and concerning the property described herein, and which said agreement and lease is now in full force and effect, and is now owned by the Stewart-Calvert Company, a corporation, and this option and agreement is made subject to the aforesaid lease and agreement."

Without that provision in the contract of purchase the rule contended for by the appellant would no doubt apply; but where the purchase is made expressly subject to the lease for a two-year term, we think that rule does not apply. The parties, no doubt, had a right to stipulate that the revenue derived from the lease should continue for the term of the lease, which was for two years. The lease was apparently a profitable one and the parties had a right to take that fact into consideration and make the sale subject to that lease, so that the sale would not avoid the lease. That agreement, it seems to us, is clearly and specifically stated in the contract of purchase. We are of the opinion, therefore, that, even though the contract of purchase was consummated, the lease was valid to the end of the two-year term and the respondents were entitled to their rents or royalties up to that time, in addition to the purchase price of \$8,000.

The judgment appealed from is therefore affirmed.

MAIN, FULLERTON, PARKER, and HOLCOMB, JJ., concur.

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Opinion Per Mount, J.

[No. 14853. Department Two. February 14, 1919.]

S. RAYBURN *et al.*, *Respondents*, v. STEWART-CALVERT
COMPANY, *Appellant*.¹

MINES AND MINERALS (17)—SALE OF CLAIMS—RIGHTS OF PURCHASER. Unlawful detainer does not lie against the lessee of mining claims which had acquired a contract to purchase the claims, subject to the payment of royalties under the lease, and had consummated the contract according to its terms paying the full price to a bank to await patent and deed; as it was entitled to possession as owner, subject to payment of the royalties.

SAME. In such a case, the fact that the lessee had sought to acquire title from another source, is immaterial, where it waived its right to a United States patent through the owner, and the purchase price was on deposit in the bank to be paid on execution of a deed.

Appeal from a judgment of the superior court for Okanogan county, Truax, J., entered January 8, 1918, upon findings in favor of the plaintiffs, in an action of unlawful detainer, tried to the court. Reversed.

J. H. Templeton and P. D. Smith, for appellant.

Mulligan & Bardsley and *E. A. Williams*, for respondents.

MOUNT, J.—This action was brought for unlawful detainer. The defense was made upon the ground that the defendant was holding the property under a consummated contract of purchase, and for that reason unlawful detainer could not be maintained. The action is based upon the facts stated in *Rayburn v. Stewart-Calvert Co.*, *ante* p. 570, 178 Pac. 454. It was stipulated that the facts in that case should control the judgment in this case. On a trial of the case, the court concluded that the appellant was holding under the lease; that, by reason of the fact that the

¹Reported in 178 Pac. 455.

rental had not been paid after the 28th day of July, 1916, and notice to pay rent or quit had been served upon the appellant, therefore appellant was holding unlawfully.

It appears that the appellant paid into the bank the full purchase price of the mining claims, namely, \$8,000. The bank notified the respondents that the money was there and would be paid by the bank to respondents when they executed a deed and delivered a patent from the United States Government, as provided in the contract of sale. The respondents have never tendered the deed nor a patent, nor have they requested that the money be paid to them. Upon the trial of the case, the president of the bank testified that the money would be paid at any time when the deed and patent were delivered. We have held in the action for rent upon the lease that the respondents are entitled to their rent or royalties for the two-year term of the lease by reason of the contract of sale to that effect; but it seems clear that, upon the contract of purchase, where payment has been made and appellant has fully complied with the terms of that contract, it is entitled to possession of the property, not as lessee, but as purchaser. It is true the appellant went into possession of the property as lessee, but afterwards its predecessor made a contract of purchase from respondents, which contract has been fully complied with on the part of the appellant. Payment has been made as provided in the contract. It seems, therefore, that appellant is entitled to hold possession under its contract of purchase, subject only to the right of respondents to collect the royalty agreed upon. It was stipulated at the oral argument that the appellant would waive the patent from the United States Government and receive the deed of the re-

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spondents to the mining property. Under these circumstances we are quite clear that an action for unlawful detainer may not be maintained. It was argued in the court below—and the same contention is made here—that the appellant sought to obtain title from another source. The record shows that there was an application by the appellant for a patent by reason of the claim of third parties to an interest in the mining claims; but even if that interest should be acquired by appellant, we are satisfied that would not avoid the contract between appellant and respondents. It would still be the duty of the appellant, in view of its waiver of the right to a United States patent, to pay the purchase price to the respondents as agreed.

There is some contention also that the bank did not have the \$8,000 in money from the appellant to pay the purchase price. The president of the bank, however, testified that he had become obligated to pay the \$8,000 and that the money was there in the bank for that purpose; so it is immaterial whether, as between the bank and the respondents, the money is the property of the bank or of the appellant.

We are satisfied, therefore, that the trial court erred in entering judgment of unlawful detainer against the appellant.

The judgment is reversed, and the cause remanded with instructions to dismiss the unlawful detainer action.

MAIN, FULLERTON, PARKER, and HOLCOMB, JJ., concur.

[No. 14797. *En Banc*. February 20, 1919.]OLD NATIONAL BANK OF SPOKANE, *Appellant*, v. E. J. GIBSON *et al.*, *Respondents*.¹

BILLS AND NOTES (66, 68)—CHECKS—"HOLDER IN DUE COURSE"—CONDITIONAL DEPOSIT. A bank which received a check for collection on a conditional credit, and honored the depositor's checks exhausting his balance, including the deposited check, thereby becomes a holder in due course, under Rem. Code, §§ 3417 and 3418, providing that a holder is deemed a holder for value where value has at any time been given for the instrument, or, if he has a lien thereon, by contract or implication of law, to the extent of such lien (MACKINTOSH, FULLERTON, MAIN, and MITCHELL, JJ., dissenting).

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 4, 1918, upon sustaining a demurrer to the complaint, dismissing an action on contract. Reversed.

Wakefield & Witherspoon and *Harry T. Davenport*, for appellant.

C. E. H. Maloy, for respondents.

TOLMAN, J.—Respondent E. J. Gibson drew a check upon his account in the Fidelity National Bank of Spokane in favor of one J. A. White, in the sum of \$440. White, upon receipt of the check, deposited the same to his account in the appellant bank. The deposit slip upon which White listed the check for deposit with appellant bank contained the following provision:

"Items other than cash are received on deposit with the express understanding that they are taken for collection only."

A conditional credit for such deposit was given the depositor, White, who, on the same day, checked out his entire balance in the appellant bank, including the

¹Reported in 179 Pac. 117.

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Opinion Per TOLMAN, J.

conditional credit derived through the deposit of the Gibson check, and has since made no further deposits. Thereafter, and in due course, the check was returned to appellant through the clearing house, with the notation that payment had been stopped thereon by the maker, Gibson. Appellant then demanded payment of the amount of the check from Gibson, which was refused, and brought this action to recover the amount thereof. The trial court sustained a demurrer to the complaint. Appellant elected to stand upon its complaint, and judgment of dismissal was entered, from which this appeal was taken.

According to the allegations of the complaint, it is appellant's claim that the check was received by it in the first instance for collection only, according to the terms of the deposit slip, but by later permitting the depositor to check out his entire account, including the amount of the check sued upon, that it thereby became a purchaser for value of such check and entitled to maintain an action against its maker to recover the amount thereof. No rights are based upon the original deposit of the check for collection, but the contention is that the depositor, White, having been paid the full amount of his balance in reliance upon the check now in suit, then on deposit with it, the relationship of principal and agent which had theretofore existed between the depositor, White, and the appellant bank was terminated, and that it did, upon making such payment, cease to hold the check for collection and became a holder in due course under the statute. The question then to be determined is whether, having originally received the check as agent for collection, the bank by honoring White's checks to an amount which entirely exhausted his balance, including the deposited check, thereby became a holder for value?

The respondent relies principally upon the following cases heretofore decided by this court: *Washington Brick, Lime & Mfg. Co. v. Traders Nat. Bank*, 46 Wash. 23, 89 Pac. 157, 123 Am. St. 912; *Morris-Müller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912; *Belsheim v. First Nat. Bank of White Salmon*, 77 Wash. 552, 137 Pac. 1055; and *American Sav. Bank & Trust Co. v. Dennis*, 90 Wash. 547, 156 Pac. 559. Of these cases, as we view them, only the first and the last touch upon the point involved, as no question of the payment of value or of who was a holder in due course was involved, or could have been raised under the facts or pleadings, in either of the other cases.

In *Washington Brick, Lime & Mfg. Co. v. Traders Nat. Bank*, *supra*, there is language employed which seems to lend support to respondent's position, but when the issues are carefully analyzed, it does not appear that any party to that action was asserting that it had parted with value because of and in reliance upon the instrument, or had become a holder in due course; and while the opinion might have stated the rule defining a holder in due course of negotiable paper, so as to avoid uncertainty and confusion, yet it is evident that the decision was arrived at and can be sustained without in anywise denying that rule.

In *American Sav. Bank & Trust Co. v. Dennis*, *supra*, however, this exact question was squarely raised by the pleadings, but appears to have been lost sight of, both in the trial court and in this court. It was decided here upon questions of the admissibility of evidence, and the fundamental question of whether the bank in that case, by payments to its depositor after the check was deposited with it, became a holder for value without notice and in due course was apparently overlooked.

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It may be frankly conceded that, in this case, the bank received the check for collection in the first instance, or conditionally, with the right to charge it back to the depositor's account if dishonored; and had no advances been made on account thereof, and so long as the original relationship continued unchanged between the bank and its depositor, the former had no right in, or title to, the check which would be sufficient to constitute it a holder in due course. It may likewise be conceded, for present purposes, as contended for by respondent, that the bank cannot occupy two different and inconsistent positions at the same time. But if the bank did not waive its right or privilege to charge the check back to the depositor upon its dishonor, and yet advanced its money upon the credit of the check so deposited, there is ample authority to support the view that, by making such advances on the credit of the deposited check, it thereby became a holder in due course to the extent of such advances, notwithstanding that it may still have claimed the right to charge the check back to its depositor, if it saw fit. *Scott v. McIntyre Co.*, 93 Kan. 508, 144 Pac. 1002, L. R. A. 1915D 139; *Noble v. Doughten*, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (N. S.) 1167; *First Nat. Bank of Elkhart v. Armstrong*, 39 Fed. 231.

It is, however, alleged and claimed in this case that, after the making of the deposit and the giving of the conditional credit before referred to, the bank and its depositor made a new and different contract with reference to the deposited check; that the latter, by presenting his own check and demanding the cash for his entire balance, and the bank by accepting such check and paying the depositor his entire balance, in effect made a new contract by which the bank waived the condition in the credit theretofore given, waived its

right to charge back the check if dishonored, and became the purchaser of the check for value without notice, or a holder in due course. No rule of law is perceived which prevents a bank and its depositors from changing, modifying, or making new and supplemental contracts as often as they may agree so to do. And if any such new or changed and modified contract is material in this case, it appears to be sufficiently alleged. After the deposit of a check and the giving to the depositor of conditional credit therefor, the depositor, by presenting his own check for the amount of his balance, including such conditional credit, thus established beyond argument his desire and request that the theretofore existing condition in the credit be waived or modified. Upon the presentation by a depositor of a check against such conditional credit, the bank may do any one of a number of things: (1) It may refuse to pay the depositor's check until assured that the conditional credit shown in the account of the depositor has become absolute by the payment of the deposited check at the bank on which it is drawn. Such a course would be a refusal to waive or contract away the previously agreed upon condition involved in the depositor's credit. (2) The bank may cash the depositor's check solely upon his individual credit, looking to him solely to pay the overdraft, if one shall result, which would constitute a new contract independent of and distinct from the previous conditional credit contract, and the bank could sue its depositor thereon. (3) The bank might, under the situation which we are now considering, waive the condition created for its own protection, make the conditional credit absolute, and pay the depositor's check upon the credit of the check theretofore deposited by him but not yet collected. This would constitute an

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acceptance of the depositor's offer made by presenting his check, and would create a new contract wholly superseding the previous conditional credit contract.

(4) Or the bank may, without inconsistency, combine the last two courses suggested and pay the depositor's check on the combined credit of the depositor and of the deposited check; just as in making a loan to a customer upon a note secured by collateral the bank would grant the credit upon the combined worth of the borrower and of the collateral pledged. This also would be an acceptance of the depositor's offer to supersede the contract for conditional credit. The allegations of the complaint and the well known custom of bankers both show that the bank in this instance relied upon the depositor's credit balance, which included the deposited check which went into and helped to create that credit balance, when it cashed its depositor's check in this instance and thereby exhausted the credit balance. And it is immaterial in this case whether the bank relied solely upon the deposited check or also in part relied upon the individual worth of its depositor. In either case it, by the subsequent transaction and by paying out its money upon the credit of the deposited check (no matter what other security in the form of the worth of its depositor it may have thought it had), thereby became the holder of such check in due course.

Our negotiable instruments law, which is the uniform law common to so many states, §§ 3417 and 3418, Rem. Code, provide:

"Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time."

"Where the holder has a lien on the instrument, arising either from contract or by implication of law,

he is deemed a holder for value to the extent of his lien."

So that, under the statute, it is immaterial to this inquiry whether the bank, by paying its depositor's check, became the absolute owner of the check now in question, or as some authorities seem to hold, obtained only a lien thereon to the amount of its advances. In either case, according to the plain language of the statute, it, under the facts pleaded here, became a holder for value to the full amount for which the check was drawn. The statute above referred to expresses only what has been the law of negotiable paper since the time "whereof the memory of man runneth not to the contrary."

The following are a few of the many authorities which might be cited to the same effect: 5 Cyc. 497; 3 R. C. L. 1056; Morse, Banks & Banking, 573; 7 C. J. 618; *Citizens' State Bank of Hamilton v. Tessman & Co.*, 121 Minn. 34, 140 N. W. 178, 45 L. R. A. (N. S.) 606; *Fredonia Nat. Bank v. Tommei*, 131 Mich. 674, 92 N. W. 348; *Shawmut Nat. Bank v. Manson*, 168 Mass. 425, 47 N. E. 196; *Jefferson Bank v. Merchants Refrigerating Co.*, 236 Mo. 407, 139 S. W. 545; *National Bank of Commerce v. Armbruster*, 42 Okl. 656, 142 Pac. 393; *Oppenheimer v. Radke & Co.*, 20 Cal. App. 518, 129 Pac. 798; and our own case of *German-American Bank of Seattle v. Wright*, 85 Wash. 460, 148 Pac. 769, Ann. Cas. 1917 D 381, which lays down the same principle.

We are convinced that, whether misled by language used in cases where the rights of no holder of commercial paper in due course were involved, or through oversight, this court arrived at a wrong conclusion in the case of *American Sav. Bank & Trust Co. v. Dennis*, *supra*, and that the trial court relied upon that

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case in making the ruling complained of here. In order, therefore, to be in harmony with the statute, with the law of negotiable paper as it has existed from the beginning, and with the great weight of authority everywhere, the case of *American Sav. Bank & Trust Co. v. Dennis*, *supra*, so far as it affects this question, must be, and it is hereby, overruled.

The demurrer admits that the bank in this case advanced to its depositor the amount of the check now in suit upon the faith and credit of the check itself; that it did so in good faith and without notice of any possible defense on the part of the maker of the check, and it is therefore a holder in due course, as we have seen, and the demurrer must be overruled.

Judgment reversed.

CHADWICK, C. J., HOLCOMB, PARKER, and MOUNT, JJ.,
concur.

MACKINTOSH, J. (dissenting).—The case of *American Sav. Bank & Trust Co. v. Dennis*, 90 Wash. 547, 156 Pac. 559, properly describes what was done by the plaintiff in this case as the granting of “a mere gratuitous privilege” which did not make it a holder for value of the deposited check. The bank cannot, by granting a privilege, alter the relationship contracted for and evidenced by the deposit slip and secure for itself the choice of a remedy against either its depositor or against the maker of the check as it may deem most advantageous. When it received the check for collection it agreed to consider its depositor primarily liable by way of holding his account subject to a back charge in the event that the check was, for any reason, dishonored, and not to hold him liable as the indorser of the check, which liability would be more difficult to enforce; the one being a matter of book-

keeping and the other involving a lawsuit in the event liability was denied. I therefore dissent.

FULLERTON, MAIN, and MITCHELL, JJ., concur with MACKINTOSH, J.

[No. 14509. *En Banc*. February 24, 1919.]

In the Matter of the Estate of MARY M. PARKES.
CHARLES H. PARKES, *Appellant*, v. J. H. BURKHART *et al.*, *Respondents*.¹

TRUSTS (10)—EXPRESS TRUSTS—PAROL PROOF. Where an heir conveyed an interest in an estate to the deceased's widow in consideration of the latter's agreement to will all the estate to him upon her death, the trust, if any, was an express trust, which cannot be established by parol where it affects real property.

EXECUTORS AND ADMINISTRATORS (72) — CLAIMS OF EXECUTOR — PRESENTATION—PLEADING. A petition filed by the executor of an estate, seeking to establish a claim in his favor against the estate, if treated as a complaint, is demurrable where it contains no allegation that a verified claim therefor was filed and presented to the judge as required by Laws 1917, p. 675, § 120, which is mandatory.

PLEADING (199)—OBJECTIONS—FAILURE TO STATE CAUSE OF ACTION. The objection that no claim was presented under the statute of non-claim, may be first presented at the trial by objection that the complaint does not state facts sufficient to state a cause of action.

EXECUTORS AND ADMINISTRATORS (72) — CLAIMS — NECESSITY FOR PRESENTATION AND REJECTION—ACTIONS ON. No contest can be waged by an executor on presentation of his claim against the estate until a rejection of the claim by the judge, and then only by suit on the rejected claim, for the bringing of which the executor must resign.

Appeal from an order of the superior court for Pierce county, Card, J., entered October 3, 1917, upon sustaining a demurrer to the petition, dismissing proceedings for equitable relief. Affirmed.

¹Reported in 178 Pac. 830.

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Opinion Per MITCHELL, J.

Hoppe & Hoppe and *Frank H. Kelley*, for appellant.
Guy E. Kelly and *Thomas MacMahon*, for respondents.

ON REHEARING.

MITCHELL, J.—This case was heard by Department Two and an opinion filed April 29, 1918; 101 Wash. 659, 172 Pac. 908. A rehearing was granted upon petitions of appellant and respondents and the case reheard by the court *En Banc*. The record in the case will not be restated except as it may be found necessary.

We adhere to the view expressed in the department opinion that the appellant is not entitled to a judgment establishing the alleged oral agreement between him and Mary M. Parkes, now deceased, relating to real property, and that the devisees under her will be charged with a trust in his favor to the extent of the property conveyed to them by the will of Mary M. Parkes.

But counsel for appellant contend that the first demand in the petition is in the alternative, so that, if he is not entitled to a judgment declaring a trust in the property given by the will to others, he nevertheless is entitled to have his claim allowed against the estate to the extent of \$6,000 he claims to have parted with in consideration of the oral promise of the decedent to devise to him all the property she died possessed of—a promise which the court now declares the statute denies him the right to prove. In other words, it is contended the alternative demand rests, not upon any claim of damages for breach of promise to devise property, but for money had and received for which there has been a failure of consideration because of the promise not provable or enforceable.

Having seen that the first demand is stripped of all equity and that appellant cannot, by declaration of trust, reach the property devised by the will, the alternative portion of the first demand then becomes an ordinary claim against the estate, and, for the purposes of this case, is in the same class as the second independent claim of appellant involved in the proceedings. The latter claim is for services alleged to have been rendered to decedent during her lifetime. While these two claims, thus considered, are set out with the fullness and particularity of complaints, they amount to nothing more than verified claims against the estate, and must be dealt with as such. The ordinary statement, verification and approval of these claims against the estate would permit, upon a contest, proof of all the facts set out in the pleading or statement as it now appears. The verified petition or statement in its present form, separately stating the two claims, was filed as one instrument in the probate cause, and without any citation issued thereon, certain persons, who are respondents here, appeared therein and successfully objected by demurrer to the petition and claims. If the petition be treated as a complaint and it be admitted that the superior court sitting in probate may hear and determine such matters, the petition is vulnerable to a demurrer because it contains no allegation that the claims had been presented to, and rejected by, the trial judge. The claimant is the executor of the will and, as such, is engaged in administering the estate. The petition was filed on June 30, 1917, after the probate code of 1917 became effective. In the subdivision of the probate code of 1917 dealing with "Claims Against Estate," section 120 (Laws 1917, p. 675) provides, if the executor is himself a creditor of the estate, his claim, duly authen-

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ticated by affidavit, shall be filed and presented for allowance or rejection to the judge of the court. That was not done in this case. In the same subdivision of the probate code, § 114 provides:

“No holder of any claim against an estate shall maintain an action thereon, unless the claim shall have been first presented as herein provided.” Laws 1917, p. 674, § 114.

The petition or statement in this case, though full and complete in other respects, contains no allegation of the presentation of either of the claims in question. Whatever may have been the rulings in the early cases, this court, in the case of *Ward v. Magaha*, 71 Wash. 679, 129 Pac. 395, declared, and has since followed, the rule that the presentation of a claim against an estate under the statute of nonclaim is a fact essential to a cause of action thereon, so that the objection that no claim was filed and presented may be first raised during the progress of the suit by the objection that the complaint does not state facts sufficient to constitute a cause of action. And again, in the case of *Seattle Nat. Bank v. Dickinson*, 72 Wash. 403, 130 Pac. 372, the statute of nonclaim was declared to be mandatory. True, the *Ward* case and the *Seattle Nat. Bank* case were instances of private parties suing an estate; and the statute at that time, § 1479, Rem. Code, provided:

“No holder of any claim against an estate shall maintain an action thereon, unless the claim shall have been first presented to the executor or administrator.”

In the probate code of 1917, however, which contains the same provisions as formerly for the presentation of claims by executors and administrators to the judge of the court, and of others to executor or administrator and then to the judge, the old § 1479 of

Rem. Code has been superseded by the broader one, § 114 of the probate code of 1917 (Laws 1917, p. 674) applicable to all claims, so that the reasoning in the two cases referred to is just as applicable to an action now at the hands of an executor. The situation in the present case discovers the wisdom of the observance of the nonclaim statute as mandatory. By paragraph one of the petition, referring to the will of Mary M. Parkes, deceased, it is alleged that, by the will:

"Real and personal property in said county and state was disposed of to your petitioner and claimant and to Emily L. Flindt of San Jose, California, J. H. Burkhart of Los Angeles, California, Frank A Burkhart of Los Angeles, California, and C. G. Burkhart of Albany, Oregon; that at the time said will became operative, Emily L. Flindt, aforesaid, was deceased, and that her heirs, legatees and devisees are Charles Flindt of San Jose, California, Homer Flindt of San Jose, California, Vella Ledwith of San Bruno, California, and Frankie Ewing of San Jose, California, . . ."

Thus it appears there will be necessity, when the proper time arrives, to go beyond the contents of the will to judicially determine who the heirs are. No such adjudication has yet been had. The time for such determination has not been reached in the process of administration of this estate. It cannot be taken for granted that all the heirs are here, for the court is powerless in this cause to determine who the heirs are. That determination must be postponed until the hearing on the final report and petition for distribution, according to § 163, p. 689, of the probate code of 1917. And who shall take care of or represent the interests of the estate and the undetermined heirs if, in the meantime, an executor, acting as such, be allowed to wage a suit against the estate? In the case of *Ward v. Magaha*, *supra*, it was said:

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Opinion Per MITCHELL, J.

“The general rule is that an executor is a trustee for the heirs, and in no sense stands in the shoes of the deceased; that he is bound by the statute, and cannot waive, as against the heirs or devisees, any requirement of the statute.”

Yet, in the present case, we find the claimant executor attempting to waive the statute of nonclaim in his own behalf and to the disfavor of those for whom he is a trustee.

If an executor have a claim against an estate on account of a debt incurred by the decedent, he is required by the statute to file it and present it, duly verified, to the judge. If the judge allow it, it then takes rank among the acknowledged debts of the estate, subject, however, to objections and contest at the hearing on the final account and petition for distribution, when, in contemplation of law, all the heirs and creditors will be present and entitled to be heard with reference thereto. On the other hand, as was said in *Wilkins v. Wilkins*, 1 Wash. 87, 23 Pac. 411:

“We must hold, that if the probate judge and an administrator cannot agree as to the amount in his favor to be allowed against the estate he represents, and he desires to further contest the matter, he must resign his trust and thus qualify himself to bring suit as any other creditor.”

If the view be adopted that appellant's petition amounts to a presentation of his claims to the judge of the court, it necessarily follows that the order dismissing the proceedings as a contest between claimant and any of the heirs was proper. No such contest may be waged until after a rejection of the claim by the judge, and then by a suit brought on the rejected claim, for the bringing of which, as we have seen, the executor must resign his trust and take the rank of an ordinary creditor.

These conclusions result in overruling the department opinion to the extent it is inconsistent herewith, and in an affirmance of the judgment of the lower court dismissing the cause.

All concur.

[No. 15054. Department Two. February 24, 1919.]

VICTOR HARRY CALHOUN, *Respondent*, v. PORTLAND RAILWAY, LIGHT & POWER COMPANY, *Appellant*.¹

CARRIERS (108) — PASSENGERS — CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS. In an action for personal injuries sustained by one injured while attempting to board a street car, it is not error to refuse a requested instruction to the effect that plaintiff could not recover if he was injured by attempting to board a moving car, and if such attempt was the proximate cause of the injury or contributed thereto, where other instructions clearly stated that the jury must find that the car had stopped when plaintiff attempted to board it, that being the only issue in the case.

APPEAL AND ERROR (414)—REVIEW—VERDICT. Where, upon conflicting evidence, the trial court exercised its discretion and refused to set aside a verdict for insufficiency of the evidence, the ruling cannot be disturbed on appeal.

APPEAL (445)—REVIEW—MISCONDUCT OF COUNSEL. Misconduct of counsel in asking the adverse party to introduce certain evidence had at a former trial is not ground for reversal where the court instructed the jury to disregard it.

Appeal from a judgment of the superior court for Clarke county, Smith, J., entered March 2, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger boarding a street car. Affirmed.

Miller & Wilkinson, Griffith, Leiter & Allen, and F. J. Lonergan, for appellant.

McMaster, Hall & Drowley and Wilbur, Spencer & Beckett, for respondent.

¹Reported in 178 Pac. 805.

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Opinion Per FULLERTON, J.

FULLERTON, J.—In this action the respondent recovered against the appellant for personal injuries received by him while attempting to board a street car owned and operated by the appellant.

The specific charge of negligence in the complaint is, in substance, this: The respondent approached the street car line of the appellant at the usual stopping place of the cars, intending to board, as a passenger, an oncoming car. The car stopped at the place named, in such manner as to lead him to believe he was invited to enter it. He attempted to enter the car and had gotten upon the steps thereof, but had not reached a place of safety, when the car was started forward suddenly and with sufficient force and violence to throw him to the ground and under the wheels of the car.

In its answer the appellant, while not denying that the respondent was injured by the car at the time and place alleged in his complaint, denied that the injury was caused in the manner therein alleged, averring that the injury was the result of the respondent's own negligence in that he attempted to board the car while the same was in motion, at a time when he knew, or by the exercise of due care and caution for his own safety ought to have known, that an attempt to so board the car was liable to cause him to fall and receive an injury. The affirmative allegations of the answer were denied by the reply, and at the trial the contest before the jury was whether the accident was caused in the manner alleged in the complaint or in the manner set forth in the answer.

At the appropriate time in the course of the trial, the appellant requested the court to give the jury the following instruction:

“The court instructs the jury that if you find from the evidence in this case that the plaintiff was injured by reason of his attempting to board a moving car of the defendant, no matter how fast or how slow the car may have been moving, and without any negligence on the part of the defendant, then your verdict must be for the defendant.”

The instruction was not given in the form requested, and it is contended by the appellant that it was not given in substance or effect. On the contrary, it is contended that the court gave an instruction to the opposite effect. The refusal to give the requested instruction and the giving of the claimed contrary instruction constitute the first error assigned.

It will be conceded, we think, since the respondent set forth in his complaint the specific cause of the accident and the specific manner in which it occurred, and since the allegation was that the car had stopped at the time he attempted to board it, he was bound to prove the allegation as alleged, and the appellant was entitled to have the instruction requested given to the jury, either in the language of the request or in language of the same purport and effect. But we cannot conclude that the charge was not to that effect. The instructions are too extended to be quoted here in full, but their perusal leaves little doubt that the jury must have understood from them that they could not find for the appellant unless they found that the attempt to board the car was made while the car was standing still and not before it had ceased or after it resumed its motion. In stating the issues, the court specifically mentioned the allegation that the car had stopped, as a material allegation of the complaint, and in its general instruction told the jury that the burden was upon the respondent to prove all of the material allegations of the complaint by a preponderance of the evidence.

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Again, in stating the grounds upon which the appellant's liability rested, one of the conditions recited was that the car must have stopped for plaintiff to board. Upon the specific question, this language was used:

"It is not a question of the rate of speed at which a car is moving which justifies an attempt to board it. If defendant's operatives did not stop for plaintiff to board said car, or if said operatives did not know that he was attempting to board said car, they cannot be charged with negligence towards plaintiff in the operation of the car at the time of the accident."

The court did, however, in the sentence preceding the quotation made, give the further instruction, namely:

"If you find that the plaintiff attempted to board the street car while the same was in motion, and that the attempt to board the car while in motion was the proximate cause of the injury, or contributed to the accident resulting in his injury, then he cannot recover and your verdict must be in favor of the defendant."

It is upon this instruction that the contention is founded that the jury were allowed to depart from the issues. The language, standing alone, it is true, might contain the inference that the obverse of the proposition stated was true, namely, that if the appellant attempted to board the car while in motion, and the attempt was not the proximate cause of his injury and did not contribute thereto, he could recover. But it is plain from the instructions cited, and especially from that part of the instruction which we have first quoted, that the court did not so intend to be understood. In these instructions he clearly stated that the jury must find that the car had stopped when the respondent attempted to board, before they could return a verdict in his favor. Nor do we think the jury could

have understood the court otherwise, or that they were misled in any way. In the first place, the contention is founded upon inference, and the direct statements in the charge are the other way. In the second place, the single issue before the jury was whether the car was stopped or was moving when the attempt was made to board it, and it is hardly possible that the jury could have understood that the issue had suddenly become immaterial. The case of *Northam v. United Rys. Co. of St. Louis* (Mo.), 176 S. W. 227, principally relied on to sustain the contention, is not in point. In that case no instruction was given covering the defendant's theory of the case, and the court distinctly charged the jury that if the plaintiff attempted to board the car after it had started in motion, and his act was that of a reasonably prudent person, the fact would not bar recovery. This was held error because without the issues, but manifestly the condition there presented is not the condition presented here.

The second claim of error is that the court overruled the appellant's motion for a new trial based on the ground of insufficiency of the evidence. It is conceded that there is a conflict in the evidence, but it is contended that the great weight of the evidence is against the verdict of the jury, and that the trial court refused to set it aside because he concluded that it was without his power so to do, there having been a former trial of the cause in which a jury returned a verdict for the same side, which had been set aside on the ground of insufficiency of the evidence. No citation to the record is made wherein the court expressed the view indicated, and our research has discovered none. The order entered is the usual order in such cases, and indicates that the trial court fully exercised the discretion vested in it. This concludes

Feb. 1919] Concurring Opinion Per PARKER, J.

the question in this court. While the trial court has jurisdiction to grant a new trial on the ground of insufficiency of the evidence, this court is without such power. We may reverse the case when there is no evidence upon some material issue necessary to be proven, but where the evidence is conflicting and the trial court approves the verdict by entering a judgment thereon, our powers to interfere on the ground of insufficiency of the evidence are foreclosed.

The final claim of error is based on the misconduct of counsel. The alleged misconduct consisted of asking the defendant to introduce in evidence certain statements claimed to have been made by a witness when testifying at the former trial. It is contended that the effect of counsel's conduct was to induce the jury to believe that the appellant was purposely withholding material evidence. But, aside from the fact that this seems to us a somewhat strained construction of counsel's conduct, the court removed any prejudice that could have arisen therefrom by instructing the jury to disregard it. The jury must be credited with some degree of intelligence, and it will be presumed that they heeded the admonitions of the court.

The judgment is affirmed.

MAIN, HOLCOMB, and MOUNT, JJ., concur.

PARKER, J. (concurring)—I concur in the conclusion reached in the majority opinion; but as to the overruling of appellant's motion for a new trial by the trial court upon the ground of insufficiency of the evidence, I prefer to rest my conclusion upon the ground that the trial court did not abuse its discretion in so ruling in this case, rather than upon the ground that this court has no power to review such discretion of the trial court. I think the view of the law expressed

in the opinion, touching the power of this court to review the discretion of the trial court in passing upon a motion for a new trial upon the ground of insufficiency of the evidence, is too broad. The statement of the rule as there made, as I construe it, means that this court is entirely without reviewing power over the trial court's discretion exercised in its disposition of a motion for new trial upon the ground of insufficiency of the evidence. I do not believe that this is the law. Of course, I concede that this court will always be slow to reverse a ruling of the trial court made upon such a question, and will always require the clearest showing of abuse of discretion on the part of the trial court before disturbing its ruling thereon; but that is far from conceding that this court has no reviewing power over such a ruling by a trial court. I think my views find support in the following decisions of this court: *Koenig v. Whatcom Falls Mill Co.*, 67 Wash. 632, 122 Pac. 16; *Thomas & Co. v. Hillis*, 70 Wash. 53, 126 Pac. 62; *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166; *Commercial Bank of Port Huron v. Elliott*, 92 Wash. 357, 159 Pac. 377; *McCabe v. Lindberg*, 99 Wash. 430, 169 Pac. 841.

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Opinion Per HOLCOMB, J.

[No. 15199. Department Two. February 24, 1919.]

SWEN OLSEN *et al.*, *Appellants*, v. FRED VENESS *et al.*,
Respondents.¹

MASTER AND SERVANT (172)—INJURY TO THIRD PERSON—SCOPE OF EMPLOYMENT—TRANSFER OF MOTOR AND DRIVER. Where a truck, with a driver in the employ of the owner, was hired by the day to a contractor, who had full control of its operation, the driver is the servant of the hirer, and the owner would not be liable to a third person injured by the driver's negligence.

TRIAL (56)—TAKING CASE FROM JURY—NONSUIT. Where there are no disputed facts for the jury, it is a matter of law for the court, on motion for nonsuit.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered December 10, 1918, upon granting a nonsuit, dismissing an action in tort. Affirmed.

C. A. Studebaker and *H. E. Donohoe*, for appellants.
Hayden, Langhorne & Metzger, for respondents.

HOLCOMB, J.—One Clark, a logging contractor, hired of the defendants, Veness and Shives, an auto truck, pursuant to the following agreement:

"The contract was drawn for either twenty-five or thirty dollars a day. I don't recall which it is for certain. They were to furnish the driver and truck, and he (Clark) was to furnish oil and gas and any repairs, breakage, to keep the truck in repair and driver's time—the truck's time was to be with the driver's time; if he worked more than eight hours, why the truck was to be more than eight hours; that price was to be an eight-hour price and over that the truck was to draw the same ratio."

This agreement, it is alleged, was made in writing, but subsequently lost, and the foregoing is the oral

¹Reported in 178 Pac. 822.

testimony of the witness Clark as to its contents. While so engaged for Clark, Smith, the driver, collided with a buggy occupied by the appellants, with consequent more or less severe injury to one of them, and considerable damages to the vehicle. The action for damages which ensued was laid against Veness and Shives, as the owners of the hired truck. At the conclusion of the plaintiffs' case, the court sustained the defendants' motion for a nonsuit. This appeal is taken from such action by the trial court.

All the material facts in the case are undisputed; the ownership of the truck by Veness and Shives; their employment of the driver, Smith; the contract of hire to Clark, and the injury, occasioned by what may fairly be conceded to be the tortious carelessness or almost wantonness of Smith, to the appellants Olsen; the pivotal question of the case being, Was Smith the servant of Clark or of Veness and Shives, for the purposes of this action?

The only and uncontradicted facts before the court touching the character of Smith's employment by Clark were as follows: On the morning of June 28, 1918, this truck, driven by Smith, who previous to that time had been working for the respondents, started to work for Clark. From the time it left its owners, the truck was operating on Clark's time, and was so operating at the time of the accident. Clark hired the truck so that he could control and operate it as his business demanded, paying for both truck and driver at the contract price per day.

Appellants contend that this was an employment somewhat analogous to that of one hiring a vehicle for a given trip, as a carriage or taxicab, and that Smith was, in fact and law, the servant at all times of respondents. They attach considerable weight to the

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fact that respondents alone hired Smith, and insisted upon his being hired with the truck, and, presumably, they alone could discharge him. The question of the right of discharge in such cases is but incidental. If Clark had been dissatisfied with Smith's services he could have effected his discharge or removal by complaint to the respondents, or by terminating the hiring of both truck and driver; the fact of the discharge would originate with the dissatisfied hirer, though the actual words might alone come from the original employer of the servant.

To our minds, the question of control of operation is the determining factor in this case. The respondents, in the course of business, had transferred the vehicle and driver to the control of the hirer, who alone could say where and in what the work of the truck should thereafter consist, and if this effected a transfer of control it must, *ipso facto*, have effected a transfer of responsibility. If such be the fact, we feel that respondents' contention, that the hirer stood, in relation to the law of this case, as if he had purchased the truck and hired the driver, must logically follow. There being no disputed facts to go to the jury, the trial court did not err in so deciding as a matter of law. *Babbitt v. Seattle School District*, 100 Wash. 392, 170 Pac. 1020.

The judgment must be, and is, affirmed.

CHADWICK, C. J., PARKER, and MOUNT, JJ., concur.

[No. 14745. *En Banc*. February 27, 1919.]

REINHOLDT GRAMS, *Respondent*, v. IDAHO NATIONAL
HARVESTER COMPANY, LIMITED, *Appellant*.¹

CORPORATIONS (263) — FOREIGN CORPORATIONS — PROCESS — DOING BUSINESS IN STATE—EVIDENCE—SUFFICIENCY. A foreign manufacturing company is doing business in this state, within Rem. Code, § 226, subd. 9, relating to the service of process, where it had on hand in a warehouse a large list of extras and repair parts of machines sold, to be sold and accounted for as its property by the warehouse company.

SAME (263) — FOREIGN CORPORATIONS — PROCESS — SERVICE ON "AGENT." An employee of a foreign manufacturing company is an "agent" for the service of process, where he was employed to do whatever was directed by the general manager and was sent to A. county in this state to check up and take possession of the company's stock of goods.

Appeal from a judgment of the superior court for Adams county, Truax, J., entered February 23, 1918, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Suppiger & Ogden and *A. E. Galligher*, for appellant.
G. E. Lovell, for respondent.

MITCHELL, J.—This suit was commenced in Adams county. It is based upon a claim, to the extent of the purchase price, for the breach of an alleged warranty, made by appellant through an agent, that a combined harvester machine sold to plaintiff in Adams county would do good work. The summons was served by the sheriff, so his return shows, by delivering to M. C. Priddy, in said county—he being the agent of defendant corporation—a true copy of the summons and complaint, on October 1, 1917. The defendant, by special appearance, moved to quash the service upon the

¹Reported in 178 Pac. 815.

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grounds: (1) That the summons was not served upon any agent of the defendant company within the state of Washington; and (2) that it was not doing business within this state at any time, other than interstate commerce business. Upon a trial, on supporting and counter affidavits, the motion to quash the service was denied. Defendant refused to plead further and there was judgment for plaintiff as demanded in the complaint. Defendant appeals.

As stated by appellant, there are two questions involved: (1) Was appellant *doing business* in this state at the time of the service on M. C. Priddy? (2) Was M. C. Priddy an agent of the appellant at the time of the service on him, within the meaning of subd. 9, § 226, Rem. Code?

The substance and weight of the proof are as follows: Appellant is a foreign corporation with its principal place of business at Moscow, Idaho. It is engaged in the manufacture and sale of combined harvester machines. In 1917 it made an oral contract with one J. W. Russell, of Spokane, to solicit purchasers, all sales to be made subject to the approval of appellant. In the summer of 1917, Russell, as agent, procured from respondent, at Ralston, Adams county, Washington, a written order for one of the machines. The order contained a warranty clause that the machine would do good work, provided, if upon trial it failed to do so, the appellant should be notified and given an opportunity to put the machine in good order. It was further agreed therein:

"If the machine can not then be made to work, the purchaser shall immediately return it to said agent and the price paid shall be refunded, etc."

It was further provided:

"This order is to be sent to the Idaho National Harvester Company, Ltd., Moscow, Idaho, for acceptance

or rejection and shall be binding on said company when accepted hereon."

The shipping directions were:

"You will please ship, on or before the 1 day of July, 1917 (or as soon thereafter as possible) to Ralston (Station), state of Washington, in care of J. W. Russell, agent."

It was also signed "Sold by J. W. Russell." The order was forwarded to the appellant at Moscow, and in due time the machine was shipped. It was delivered by J. W. Russell to the respondent on his farm. The machine did not give satisfaction. Russell went out with a mechanic several times and tried to make it work, stated it could not be made to work and that the company would take it back. M. C. Priddy, another agent of the company, went out to the farm to see the machine and told respondent the company would take it back. Afterwards, on the orders of Priddy and Russell, other farmers in the community took various parts of the machine to repair their machines recently purchased from appellant through Russell; and both Russell and Priddy took various parts of respondent's machine to repair the machines of others. A number of machines were sold and delivered by Russell in the vicinity of Ralston; and on complaints from several of them Russell, Priddy and their experts called on the farmers and tried to put the machines in working order.

There is located at Ralston the Union Elevator & Warehouse Company, which does, among other things, a mercantile business, one L. O. Thomas being its manager. In July, 1917, at Ralston, Russell, while unloading harvesting machines, putting them together, and superintending the delivery of them to various customers, as agent of appellant, stated to Thomas,

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as manager of the mercantile company, that it was necessary to have an agency there to sell repairs for the machines; and made arrangements with him, as manager of the Union Elevator & Warehouse Company, for the sale of the same on a commission, the goods remaining the property of the appellant until sold. Russell left with Thomas a list of repair goods that would be forwarded. In August a large number of repair articles were shipped by appellant, consigned to and received by the Union Elevator & Warehouse Company at Ralston. Later, on request of Thomas, appellant sent a list of the articles with directions how to sell and handle them. At various times Thomas sold repairs to different persons, among them one Edward Friese. After the sale to Friese, upon being asked by Thomas for payment, Friese settled the account by delivering to Thomas what was termed a "warranty voucher," drawn by appellant, signed by M. C. Priddy as agent, authorizing delivery to Friese at appellant's expense the articles theretofore sold by Thomas. In October, 1917, after harvest, M. C. Priddy went to the place of business of the Union Elevator & Warehouse Company at Ralston, made an inventory of all repair articles on hand, represented to Thomas that appellant needed the stock at its office in Moscow, took the goods, shipped them to appellant at Moscow, and gave Thomas a receipt for them.

M. C. Priddy testified that, on the day the summons was served on him, he was in Adams county for the purpose of checking and handling a stock of extras or repair parts of the machines on hand with the Union Elevator & Warehouse Company at Ralston, having been sent by the manager of appellant to do this particular work. He held no official position with appellant. He worked by the month for a salary and had no regular kind or class of work, but did different work

and performed different duties as the manager of appellant instructed, assigned, or directed him to do. The general manager of the company at Moscow, Idaho, corroborates M. C. Priddy as to the character of the latter's relations with the company and the purpose of the trip to Adams county.

Appellant reduces the inquiry in this cause to two points, being the same as those mentioned in its motion to quash the service heretofore set out.

The statute relating to the service of summons provides, if the action be against a foreign corporation doing business within this state, the summons may be served on "any agent" thereof. In argument, respective counsel have called attention to a large number of cases on this subject by this and other courts. They differ more or less as to the facts. The point as to whether or not appellant was *doing business* in this state at the time of the service of the summons must be answered in the affirmative. At the time, in Adams county, the Union Elevator & Warehouse Company had on hand a large list of extras and repair parts of the machines for sale, put there by appellant by direct shipment to be sold, and many of the articles were sold, as appellant's property, under an agreement to sell them as directed by appellant and account to it for the proceeds of all such sales. Such situation responds to the requirements of the statute and constitutes *doing business*. The case of *Womach v. Case Threshing Machine Co.*, 62 Wash. 661, 667, and 668, 114 Pac. 509, was similar to this. It was a case of selling by a foreign corporation, through an agency for a single season, of extras, supplies and repair parts for machines. In the course of that opinion, this court said:

"This is an entirely different transaction than the one under consideration in the case of *Mikolas v.*

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Walker & Sons, 73 Minn. 305, 76 N. W. 36. There, as the court said, the relation between the parties was the very familiar one 'between manufacturers and wholesale dealers, by which the manufacturer agrees to sell his goods only to a certain wholesale dealer in a city, who in turn agrees to buy them exclusively from the manufacturer, and to sell them at prescribed prices fixed by the manufacturer' in consideration of certain rebates from the usual prices. But here there was no agreement to buy the appellant's goods on the part of the agent. It simply took them as the appellant's property and agreed to sell them for the appellant, as the appellant's property, at such prices and on such terms as the appellant should direct, and account to it for the proceeds of such sales. In the first case there was an outright purchase of the goods from the manufacturer by the dealer. After receiving the goods it could lawfully do what it pleased with them, rendering itself liable only to an action in damages for a breach of contract if it disposed of them in a manner contrary to its agreement. But in the case at bar, no such purchase was contemplated, and any interference with the appellant's ownership, outside of the strict terms of the agency contemplated by the agreement, would have been a subject of inquiry under the criminal statutes."

Upon the second branch of the case, we think there can be no question that M. C. Priddy, at the time of the service of the summons and complaint upon him, was "an agent" of the appellant, within the contemplation of the statute. For some time he had been, and was still, employed to do whatever he was directed to do by the general manager of the company; and at the time in question, under instructions of the company, he was in Adams county to check up and take over all the property of appellant remaining in the hands of the Union Elevator & Warehouse Company. While there, he rendered that service and gave the merchant a receipt for the goods, took the goods, and

shipped them to his principal, the appellant. This court, in the case of *Barrett Mfg. Co. v. Kennedy*, 73 Wash. 503, 131 Pac. 1161, after enumerating a number of cases from this and other courts upon this subject, further refers to some of them and concludes as follows:

“In the *Jenkins* case [73 S. C. 526, 53 S. E. 991], a service of summons upon a timekeeper of the defendant, a foreign corporation, was held sufficient. The court said that the legality of the service did not depend upon the tenure of service, but ‘upon the character or nature of the service,’ and that ‘agency may also be shown by the fact that a person represents the master in some one or more of his relations to others, even though he may not have power to contract. The statute makes service on ‘any agent’ of a foreign corporation sufficient. The statute, therefore, does not require that the agent shall be general, but is complied with by a service upon an agent having limited authority to represent his principal.’ In the *Cottrell* case [83 Va. 512, 3 S. E. 123], the court defined the term ‘agent’ as signifying ‘any one who undertakes to transact some business affair for another by authority and on account of the latter, and to render an account of it.’ In the *Moinet* case [143 Mich. 489, 106 N. W. 1126], it was held that a traveling salesman of a domestic mercantile company is an agent within the meaning of the statute permitting service of process ‘upon the agent’ of a corporation. The words of the statute ‘any agent’ were intended to have a broad meaning, and must be liberally construed to effectuate the legislative intent. While they may not include a day laborer or an employee who has no authority to represent the corporation in any way other than to discharge his daily task, they must be held to include all such agents as represent the corporation in either a general or a limited capacity.”

Having seen that appellant was doing business within the state at the time of the service of the summons, makes it unnecessary to consider its contention

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Syllabus.

of protection under the commerce clause of the Federal constitution.

Affirmed.

CHADWICK, C. J., MOUNT, MACKINTOSH, HOLCOMB, MAIN, PARKER, and TOLMAN, JJ., concur.

[No. 14898. Department Two. February 27, 1919.]

MARY DILLABOUGH, *Respondent*, v. OKANOGAN COUNTY,
Appellant.¹

APPEAL AND ERROR (451)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE. Error in the admission of evidence in an action tried to the court is harmless.

SAME (432)—REVIEW—HARMLESS ERROR—PARTY NOT ENTITLED TO SUCCEED. Error in refusing requested findings is harmless, where the judgment was justified in any event.

HIGHWAYS (62, 67)—INJURIES FROM DEFECTS—NEGLIGENCE—EVIDENCE—SUFFICIENCY. A finding of negligence in the construction and maintenance of a culvert is sustained by evidence that engineers advised the county that the proposed culvert was too small to carry off the waters in times of freshets, and that the same was maintained for two years after such fact was demonstrated by washouts, without taking any steps to remedy the defect or warn the public.

SAME (65)—INJURIES FROM DEFECTS—CONTRIBUTORY NEGLIGENCE. It is not negligence *per se* for a traveler by auto stage to ride in an overloaded car over a muddy, slippery road, in high gear, even in the nighttime.

NEGLIGENCE (22-1)—IMPUTED NEGLIGENCE—DRIVER AND PASSENGER. The negligence of the driver of an auto stage in approaching an unsafe culvert over a slippery road, in high gear, cannot be imputed to a passenger.

HIGHWAYS (62)—INJURIES FROM DEFECTS—PROXIMATE CAUSE. The overloading of an auto stage is no defense to an action by a passenger for injuries sustained through the negligence of the driver in approaching an unsafe culvert, where it was not shown to be the proximate cause or that it contributed thereto.

¹Reported in 178 Pac. 802.

Appeal from a judgment of the superior court for Okanogan county, Neal, J., entered June 18, 1917, upon findings in favor of the plaintiff, in an action for personal injuries, sustained through a defect in a county road, tried to the court. Affirmed.

Chas. A. Johnson, A. J. O'Connor, and Wm. C. Brown, for appellant.

P. D. Smith and W. C. Gresham, for respondent.

FULLERTON, J.—The respondent, while a passenger in an automobile which was being driven over a public highway of the appellant county, received an injury, and brought this action against the county to recover in damages therefor. After issue joined, the action was tried by the court, sitting without a jury, and resulted in the entry of a judgment in the respondent's favor in the sum of \$1,653. From the judgment so entered, the county appeals.

The facts necessary to an understanding of the questions involved, as we gather them from the evidence, are in substance these: The highway on which the injury occurred is the principal highway leading from the town of Okanogan to the town of Conconully, and is a much traveled way. At a point some one and one-half miles from Okanogan, it crosses a creek known as Salmon Creek. This creek is a torrential stream with precipitous banks, drains a large area of country, and at times, particularly in the spring and early summer, carries a considerable volume of water under normal conditions. It is also subject to periodical freshets, at which times the volume is greatly increased.

As a road crossing over the creek, the county constructed a culvert. They placed a corrugated pipe, some thirty feet long and forty-eight inches in diam-

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eter in the bed of the stream and filled the remaining part of the channel for a width of about fifteen feet, up to a level with or perhaps slightly higher than the creek's banks, with earth, gravel and loose stone. The culvert was constructed in the latter part of the year 1913. Prior thereto, the government of the United States had constructed, higher up on the stream, a storage basin for irrigation purposes, which it filled during the freshet seasons with water that would naturally flow down the creek. This reservoir seems to have absorbed the surplus water of the stream for a year or so previous to the erection of the culvert. In the freshet season of 1914, it was made evident, however, that it would not do so at all times, and it was made evident, also, that the pipe was inadequate. During that season, the water backed up in front of the pipe on a number of occasions almost to the top of the banks of the creek, and on one occasion ran over the banks across the roadway and into the creek below the culvert, although the pipe was carrying water at the several times to its full capacity. The same thing happened in the freshet season of 1915. At that time, if not in 1914, the condition was called to the attention of the county officers and they were warned of the danger of the culvert being washed out. Indeed, the matter seems to have been a subject of discussion among them at one time, one of such officers, a deputy in the office of the county engineer, testifying:

"We talked about it; talked about the advisability of tearing it (the culvert) out and putting in another, putting in a larger one, but we came to the conclusion that it was just as well to let it stay there and the county could put in another one without the expense of tearing that one out; we said it was just a question of time when some flood would come along."

At about 9 o'clock in the evening of June 21, 1916, one Hubbard left Okanogan in an automobile to drive to Conconully. He was a mail carrier and carried the respondent as a passenger. The road leading from Okanogan to the crossing of the creek runs parallel to the course of the creek. As it approached the crossing, it made a rounding turn, so that the lights of an automobile would not fall upon the crossing until the machine was almost directly upon it. The driver of the automobile testifies that he drove over the road at a moderate rate of speed and in a careful manner; that his automobile had chains upon the hind wheels; that its brake was in good condition and the lights thereon were burning brightly; that, as the automobile turned toward the culvert, it was discovered that it had partially washed out; that it was then too late to stop the automobile, although he made an effort so to do, and that the car was precipitated into the washout and turned over. It was at this place and from this circumstance that the respondent received the injuries for which she sues.

The evidence discloses, also, that the culvert had been in a dangerous situation for some weeks immediately prior to the time it actually washed out. The pipe had again proved inadequate to carry the water. The water had, a number of times, risen close to the top of the banks of the creek, and had at one time overflowed the banks and passed over the roadway. It was regarded as dangerous by the people residing near it and by those who, from necessity, were required to use it. The county officers were notified of the situation, and the road foreman had been giving it some special attention, keeping the intake of the pipe free from drift and other debris. The foreman was obliged to leave the place about a week before the

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washout occurred and left the matter in charge of others, but just what these others did during his absence seems not to be disclosed by the evidence. No barriers or lights or other warning signs were placed at the crossing prior to the accident, although a witness living on the creek, near the place, becoming alarmed at the rapidly rising water, started there for the purpose of putting up a light and was on his way when the accident happened.

In her complaint, the respondent charged the county with negligence in two respects: Negligence in the original construction of the culvert, and negligence in allowing it to remain in its unsafe condition after they had knowledge thereof, without giving the public warning of such condition. To substantiate the first ground of negligence alleged, the respondent called civil engineers, who were permitted, over the objection of the appellant, to give their opinions as to the sufficiency of the structure to accomplish the purposes intended; whether it was a reasonably safe structure within the knowledge the county had at the time of its construction or might have acquired by reasonable inquiry; and what would have been a proper structure.

The first error assigned is on the ruling of the court admitting this testimony. But, while it is probable that the witnesses in certain instances were permitted to go beyond the rule, we find nothing in it that requires a new trial, or a rendition of a judgment for the other side. As we have stated, the action was tried by the court sitting without a jury. It is thus triable in this court *de novo*. (Rem. Code, § 1736.) The admission of inadmissible evidence in cases so tried is, therefore, not ground for a new trial. The appellate court can and will disregard the inadmissible evidence and try the issues submitted upon the evidence legiti-

mately in the record. If it finds that the judgment must rest upon evidence not admissible, it will reverse the judgment rendered and direct a judgment for the other party. On the other hand, if it finds that the evidence preponderates in favor of the judgment, after disregarding the inadmissible evidence, it will affirm the judgment. *Rohrer v. Snyder*, 29 Wash. 199, 69 Pac. 748. Indeed, we have admonished trial courts, in the trial of causes without a jury, to be "liberal . . . in admitting evidence so that this court, in the event of an appeal, will on a trial *de novo*, have all material facts before it for consideration, and thus avoid the necessity of the cause being remanded for the admission of material evidence erroneously rejected." *Degginger v. Martin*, 48 Wash. 1, 92 Pac. 674.

This court will, of course, in a proper case, make allowances with respect to costs, where it can see that the record is overburdened with inadmissible evidence. But here no such question arises. The objectionable part of the record consists of isolated questions and answers almost negligible in this regard, and moreover no question is made with respect to costs.

Another contention is that the court erred in refusing to make certain findings of fact requested by the appellant. Without stopping to point them out, we agree with the appellant that a number of them were justified by the evidence, but we do not think them at all material. In other words, all that were justified by the evidence could have been found and still the judgment remain the same. It is not necessary that a trial court find every fact which the evidence warrants it in finding. It is sufficient if the findings cover all of the issues and support the judgment rendered. In this instance, the findings are thus broad and no necessity

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exists for sending the cause back for further consideration.

The principal contention of the appellant is that the evidence does not justify the findings made and the judgment entered. In our opinion, the respondent sustained the burden of proof on each of the grounds of negligence set forth in the complaint. When the necessity for a road crossing over the creek at which the injury occurred arose, the officers of the county, having the construction of the crossing in charge, sought the opinion of engineers and others on the question whether or not the pipe proposed to be inserted would be sufficient to carry the waters of the stream. These, without exception, expressed the opinion that the contemplated opening would prove too small, some of them expressing the opinion that two pipes of the size contemplated would not afford any considerable margin of safety. The pipe was put in on the recommendation of the county engineer, who seems to have been alone in the opinion that it would carry the water in times of freshets. When, in addition to this, the turbulent nature of the stream, the size of the area drained by it, and the quantity of water that is sometimes wont to flow down it is considered, it would seem to be too much to say that due caution was exercised in the selection of the pipe through which the water must flow. It may be that the county officers were misled to some extent by the fact that the government reservoir had absorbed the surplus waters of the stream for the two or three years preceding the insertion of the culvert, but this hardly affords a reason for thinking it would continue to do so. That the government engineers who planned the reservoir did not so think is evidenced by the fact that elaborate spillways were provided for relief against excessive quantities of

water; and one of such engineers, when consulted with reference to the size of the pipe to be put in the culvert, advised a pipe in double the capacity of the one put in.

Again, we think the county was negligent after it had discovered that the pipe was insufficient to carry the water of the stream. It was demonstrated at least two years prior to the time that it actually washed out, that there was danger of its so doing, and within a few days preceding that time the county officers were warned of its then dangerous condition. Yet they took no steps either to correct the defect or to warn the users of the road to be on their guard for a possibly dangerous condition. The county owed to the traveling public one or the other of these duties. After it has knowledge that a particular place in a public highway is in imminent danger of becoming hazardous, it must take such steps as are necessary to warn against it. It cannot remain passive until the expected thing actually happens, and then claim immunity because it was without knowledge of the actual happening. *Wiltse v. Town of Tilden*, 77 Wis. 152; 46 N. W. 234; 13 R. C. L., p. 348, § 286; note to *Miller v. Detroit*, 16 Ann. Cas. 835.

It is contended that the respondent was guilty of contributory negligence. It is said that the automobile was overloaded; that the roads were muddy and slippery; that the respondent had been warned of the possibility of the culvert being out; that the automobile was running on high gear at the time of the accident; and that an opportunity was presented to discover that the culvert was out for some distance before it was reached. The evidence does disclose that the road was muddy and slippery in places, and that the automobile was being run on high gear when it

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approached the washout. We cannot, however, think that either of these circumstances convicts the respondent of negligence. It is not negligence *per se* to ride in an automobile over a muddy and slippery road, even in the nighttime. The manner of running the car rested with the driver, and his faults cannot be rested upon the respondent, unless of course, his fault was the sole cause of the injury. *Beach v. Seattle*, 85 Wash. 379, 148 Pac. 39.

The other contentions have no support in the evidence. It was shown that there were six persons in the car, while its seating capacity was normally for five persons; but, aside from the fact that the circumstance does not prove an overloading, the overloading, if it existed, was not shown to be the cause of the accident, nor was it shown to have contributed thereto. The warning claimed to have been given was not made to the driver of the automobile, and was not of such a nature as to put the respondent on her guard. The claim that the washout ought to have been observed is founded on the claim that the automobile passed over a ridge some one hundred and thirty-five feet prior to reaching the culvert, from which point its lights would flash over the culvert. But, if this be true, the washout was not then in fact observed; and clearly, it was not negligence on the part of the respondent to fail to observe it. The respondent owed no duty to examine every part of the road before attempting to pass over it. She had the right to assume that it was in its normal condition, and reasonably safe for travel.

We find no reason for interfering with the judgment rendered, and it will stand affirmed.

MAIN, PARKER, and HOLCOMB, JJ., concur.

[No. 15029. Department Two. February 27, 1919.]

R. N. LEEZER, *Respondent*, v. S. S. FLUHART *et al.*,
Appellants.¹

GUARANTY (9)—STOCKHOLDERS' GUARANTY OF CORPORATE DEBT—CONSTRUCTION—EXTENT OF LIABILITY. A contract whereby stockholders bound themselves to pay the full amount of the company's debt or forfeit the amount of stock set opposite their names, reciting that "this guarantee of payment" is in satisfaction in full of the claim and lien against the company, is a promise to pay in money, to which the privilege of taking stock is collateral, the option being in the promisee; especially where the promisors, in tendering the stock, reserved the right to redeem it at its redemption value.

CORPORATIONS (55)—STOCK—TRANSFER—CONTRACT—PREFERENCES. A creditor, accepting preferred stock upon a stockholders' guaranty of the company debt, takes the same with all the privileges accorded by the by-laws providing for the retirement of preferred stock by payment of the purchase price with the privilege of receiving common stock, and his relation as a preferred stockholder would not be severed by a tender of the amount of the debt after he had closed the account.

GUARANTY (13)—DISCHARGE—PAYMENT OR SATISFACTION—TENDER. Under a contract whereby stockholders guaranteed to pay the company's debt in money or by the forfeiture of an aggregate amount of stock, a tender of the stock reserving the right to redeem it under a by-law of the company would be a discharge of the guaranty, since the terms of the by-laws could not be injected into the contract.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 24, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract, after a trial on the merits. **Affirmed.**

Revelle & Revelle, for appellants, contended, among other things, that the promise was in the alternative, with the choice in the promisor. 6 Ruling Case Law, p. 860; 13 Corpus Juris, p. 629; 7 Am. & Eng. Ency.

¹Reported in 178 Pac. 817.

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Law (2d ed.), p. 125; 1 Sutherland, Damages (Berryman's 4th ed.), § 282; *Standard Distilling Co. v. Consolidated Adjustment Co.*, 157 Ill. App. 215; *Smith v. Durell*, 16 N. H. 344, 41 Am. Dec. 732; *Smith v. Sanborn*, 11 Johns. (N. Y.) 59.

If the choice were in the promisee, he must give notice of his election and make demand before he can sue. 7 Am. & Eng. Ency. Law (2d ed.), p. 125; 13 Corpus Juris, p. 629; *Center v. Center*, 38 N. H. 318; *Williams v. Triplett*, 3 Clarke (Iowa) 518; *Barker v. Jones*, 8 N. H. 413; *Manvel v. Holdredge*, 45 N. Y. 151.

Elias A. Wright and *Sam A. Wright*, for respondent. The presumption is that the debt was to be paid in money, and that the stock was collateral. *Fell v. H. Fell Poultry Co.*, 69 N. J. L. 429, 55 Atl. 236; *Borland v. Nevada Bank of San Francisco*, 99 Cal. 89, 33 Pac. 737, 37 Am. St. 32; *Patchin v. Swift*, 21 Vt. 292; *Plowman & McLane v. Riddle*, 7 Ala. 775; *Dumas v. Hardwick*, 19 Tex. 238; *Ramsey v. Waltham*, 1 Mo. 395; *Rewrick v. Goldstone*, 48 Cal. 554.

The party having the choice, must make election before default. 2 Parsons, Contracts (9th ed.), p. 804; James, Option Contracts, § 1118; Elliott, Contracts, §§ 1885, 1886; 6 Ruling Case Law, p. 860, § 247; *Choice v. Moseley*, 1 Bailey (S. C.) 136, 19 Am. Dec. 661; *McNitt v. Clark*, 7 Johns. (N. Y.) 465.

CHADWICK, C. J.—Respondent held a certain lien claim in the sum of \$1,065.18 against a mining company in which all the parties to this action were stockholders. Foreclosure being threatened, appellants delivered to respondent a writing as follows:

“Dr. R. N. Leezer, September 28th, 1917.

“Seattle, Washington.

“Dear Sir: For the purpose of effecting a settlement conforming to demand that all claims shall be

settled by an appropriation of \$15,000 now available, practically all of which is required for settlement of accounts and notes long past due in the state of Oregon, *the undersigned hereby bond themselves to pay the full amount of the balance due you*, Dr. R. N. Leezer, from the United Copper Company, in cash on or before April 2nd, 1918, *or forfeit to you the aggregate amount of stock*, preferred of the United Copper Company, set after our names hereto respectively, and this letter shall constitute an order upon the said United Copper Company for delivery of said stock without further notice or demand, the same to be charged to our respective accounts.

"It is understood *this guarantee of payment* is acceptance upon your part of satisfaction in full of your claim against the said United Copper Company and that you will execute a release to the lien now filed by you against its properties in Jackson county, Oregon, at once.

"S. S. Fluhart4,000 shares.

"Wm. Reinecke2,000 shares

"B. E. Fluhart4,000 shares

"Signed and delivered in the presence of

"A. J. Hillman, Witness.

"F. Meade, Witness."

We have italicized the parts of the contract which will call for reference and discussion. The money was not paid when due, and this action was brought to recover a money judgment.

It is the contention of the appellants that the contract is not an absolute promise to pay money, but is an agreement to pay in money or in the preferred stock of the company, the option being with the promisors; that a failure to pay in money is an exercise of the option; that, therefore, the contract stands as an order for the stock, and that they are thereupon absolved from all personal liability.

When respondent brought suit, appellants caused a certificate for 10,000 shares of the preferred stock of

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the company to be issued, and made tender of it by leaving it at the home of respondent during his absence. The stock so tendered was indorsed by the secretary of the company, with a notation reserving to the company the right to redeem the stock at any time upon payment of 10.45 cents per share.

A great many cases are cited on either side upon the law of an election to pay in one way or another as may be provided by contract; and we may admit the general rule that, when the condition of an obligation is in the disjunctive, it may be discharged by the performance of either of the enumerated acts, at the election of the obligor. 6 R. C. L. 860; 13 C. J. 629. But, after all, cases of this character are not to be decided upon some abstract principle of the law, but upon the essence of the contract as it may be gathered from its context. When so considered, we cannot give the promise the character claimed for it. The original demand was against the mining company. It was secured by a lien. That a fund of \$15,000 might be appropriated to the payment of other claims, appellants made themselves personally liable. They bound themselves to pay the full amount of the balance due to the respondent on or before a certain date, *or forfeit* the stock which respondent might upon show of the contract demand. The option was in the promise. Furthermore, the contract is a guarantee of payment—which, in the absence of qualifying terms, must be construed to be a payment in money—in consideration of a release of a lien then on file and subject to foreclosure.

The contract is not by its terms a promise to pay in money or stock, but a promise to pay in money to which the privilege of taking the stock is collateral. The meaning of a contract may frequently be deter-

mined by a resort to the doctrine of probability, by answering the question, What is the common sense of it? It is not likely that respondent, having a lien secured by all of the property of the company, would have put himself in a worse position; that he would have sold a right secured by all the physical assets of the company for a few shares of stock representing an infinitesimal part of the property of a company then unable to pay its debts in money. The stock is collateral to the promise to pay in money, and if it had been received by respondent, he must have treated it as collateral. Taking the contract as it reads, we have no doubt that appellants would have had a right to insist upon a foreclosure and sale of the collateral if it had been accepted by respondent and it had increased in value.

Our conclusion is strengthened by the fact that the stock tendered provided that it could be redeemed for the amount of respondent's claim. The secretary of the company says that such was the meaning and intent of the indorsement, although an error of two-tenths of a cent on each one dollar was made in writing the redemption value. But it is said that respondent cannot profit by the claim of this privilege, or be heard to say that the tender was conditional, for the reason that the contract calls for preferred stock and that the by-laws—of which respondent, being a stockholder, had notice—provide that preferred stock might be redeemed by the repayment of the purchase price. We do not so read the by-laws: It is provided:

“The preference shares, when issued . . . shall convey the following expressed preference to the holders thereof, to wit:

“The preference shares confer upon the holders thereof the right to participate in the exclusive dis-

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tribution amongst themselves, the whole of the profits declared for dividends until the total dividends so paid shall amount to one hundred per cent of the sum paid therefor to this company as shown by its books of account together with interest at the rate of seven per cent per annum thereon or on so much thereof as shall from time to time remain invested. Said preference stock shall cease to have any preference from the day and date of notice by the company that it is prepared to make payment in full as aforesaid with accrued interest and to issue one share of common stock for and in lieu of each share of preference stock the company may elect to retire. . . . The holders of the preference shares shall be protected to the extent of one hundred per cent of the sum paid for said preference shares to this company, as shown by its books of accounts, without interest, as against the common shares of the company in case of dissolution or liquidation in that the said preference shares shall first participate in the distribution of the proceeds derived from the sale of the assets of the company; and shall rank on an equal basis with the common shares in the sum remaining."

The thing here attempted is a reservation of the right to retake the stock upon payment from whatever source of the amount of a debt which the company had attempted to assume, and without a grant of the privilege of receiving common stock, share for share, as is provided in the by-laws. Having invoked the by-laws, appellants are bound by them; and were respondent to be held to an acceptance of the stock, he would have a right to insist upon redemption out of the dividends, with attendant privileges. His relation to the company as a preferred stockholder could not be severed by a tender of the amount of his debt. The conduct of appellants in tendering the stock with a reservation of the right of redemption by paying the amount of the debt cannot be explained upon any theory other than that they regarded the stock as col-

lateral to the promise to pay in money and were entitled to any advantage if the stock should perchance increase in value.

Furthermore, the contract sued on was not made by the company, but by the appellants, and upon the theory now advanced by them respondent would be entitled to his money or the stock—not the stock hampered by any conditions or redemption features, but the “aggregate” amount of the stock. If the company attempted to assume the obligations of the contract, as it is said that it did, it must be bound by its terms. It could not inject its by-laws as a limitation upon the right of respondent to forfeit *the aggregate amount* of the stock—that is, 10,000 shares. If the contract calls for payment in the alternative respondent would be entitled to his money or ten thousand shares of stock, “the aggregate amount.” He would be entitled to close the account, and, when appellants either directly or indirectly undertook to hold it open by asserting a right of redemption, they affirmed and acted upon the contract as one calling for payment in money with a promise to hold and deliver 10,000 shares of the company’s stock as collateral.

Affirmed.

MOUNT, TOLMAN, and PARKER, JJ., concur.

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[No. 15037. Department Two. February 27, 1919.]

EMMA WOMACH, *Appellant*, v. E. F. STUERMER,
Respondent.¹

LANDLORD AND TENANT (124, 129) — UNLAWFUL DETAINER — DEFENSES. A tenant holding over after appointment of a receiver in partition proceedings, knowing that the receiver was in possession and that the land was to be partitioned, cannot hold the land or the receiver for payment for summer-fallow under a contract with one of the owners who had no authority to make the contract; notwithstanding the receiver received the rent for the current year.

PARTITION (22)—RECEIVERS (60)—SALES — TITLE OF PURCHASER. Where land was sold at receiver's sale in partition proceedings, the purchaser took the entire title, free from a tenant's claim for summer-fallowing not of record.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered March 29, 1918, upon findings in favor of the defendant, in an action of unlawful detainer, tried to the court. Reversed.

G. E. Lovell, for appellant.

H. W. Reading and *Freece & Pettijohn*, for respondent.

MOUNT, J.—This action was brought by the appellant for possession of certain farming land, in Lincoln county. The complaint alleged that the plaintiff was the owner of the land and that defendant was in possession and refused to vacate. The defendant admitted that the plaintiff was the owner of the land, but claimed the right to hold possession until he was paid for summer-fallowing one hundred and fifty-four acres. The case was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff for possession of the land, subject to the claim of de-

¹Reported in 178 Pac. 801.

fendant for \$616 for plowing and discing the summer-fallow. The plaintiff has appealed from the latter part of the judgment.

It appears that, prior to the year 1916, the land was in the possession of Amanda Sandygren, who in that year leased the land to the respondent. This was a written lease, which provided that the respondent should farm the land and give to Mrs. Sandygren one-third of the crops raised thereon. In that year, other parties, claiming to own an interest in the land, brought an action for a partition thereof. While that suit was pending, Mrs. Sandygren, retaining possession of the land, continued the original lease by oral agreement. In 1917 a receiver was appointed, and the land was partitioned among the co-owners. Pending that litigation, Mrs. Sandygren agreed with the respondent that he should summer-fallow certain of the land, promising him that he would be paid a reasonable price for plowing and summer-fallowing the land in case it was sold on partition. Under this agreement, the respondent continued to farm the land for the year 1917; and after the receiver was appointed, the receiver recognized the tenancy of the respondent and collected the rent for that year. In August of 1917, the land was sold at receiver's sale, and the part which had been summer-fallowed was bid in by the appellant. At the sale, the respondent asked the receiver who made the sale if the land was being sold subject to his claim for summer-fallowing. The receiver responded that the interest of the estate only was being sold. Thereafter, in March, 1918, the respondent was proceeding to seed the summer-fallow, when this action was brought.

It is apparent that Mrs. Sandygren had no authority to bind the land by any agreement of her own. The

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tenant knew that the receiver was in possession, and that the land was to be partitioned by sale if necessary. It is not shown that the receiver made any agreement to pay for summer-fallow or had authority to do so. The fact that the receiver collected the rent did not bind the land to any contract which respondent had with Mrs. Sandygren. When the land was sold at receiver's sale, the whole interest of the estate was sold and the purchaser took title free of all claims not of record. We are satisfied, therefore, that the agreement with Mrs. Sandygren did not authorize the appellant to hold possession of the land or to enforce against the land the oral agreement with Mrs. Sandygren.

That part of the order appealed from is therefore reversed.

HOLCOMB, FULLERTON, MAIN, and PARKER, JJ., concur.

[No. 15206. Department One. February 27, 1919.]

GEORGE H. SAAR *et al.*, Appellants, v. W. C. WEEKS
et al., Respondents.¹

APPEAL AND ERROR (282)—STATEMENT OF FACTS—NECESSITY—DISALLOWANCE OF AMENDMENT. Error cannot be predicated upon the disallowance of an amendment to an answer, in the absence of a statement of facts containing the showing made before the trial court.

DISCOVERY (15)—INSPECTION OF WRITING—MATERIALITY. It is not error to refuse to allow plaintiff an inspection of writings, where defendants struck out all reference thereto, and plaintiffs set out the agreement verbatim in their reply.

JUDGMENT (200)—CONCLUSIVENESS—PERSONS CONCLUDED—PRIVITY. In an action to quiet title, an answer pleading a former adjudication as to the title against the K. lumber company and that plaintiff was identified in interest with such company states facts constituting a defense.

TRUSTS (20)—CONSTRUCTIVE TRUST—FRAUD. Property obtained through the fraudulent practices of a third person will be held under a constructive trust for the person defrauded although the person receiving the benefit was innocent of collusion, since he adopted the means by which it was procured.

DISCOVERY (10)—FAILURE TO ANSWER INTERROGATORIES. Default is properly taken against plaintiffs who refuse to answer interrogatories submitted by defendants calling for facts material to the defense.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 23, 1918, dismissing an action to quiet title, on plaintiffs' default in failing to answer interrogatories. Affirmed.

John G. Barnes, for appellants.

Peters & Powell, for respondents.

TOLMAN, J.—The appellants, as plaintiffs below, on November 19, 1910, filed their complaint in an action

¹Reported in 178 Pac. 819.

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to quiet title to certain real estate, in King county, Washington. The complaint was in the usual form, alleging ownership, the right of possession, that the land was vacant and unoccupied, and that the defendants, respondents here, made an adverse claim of ownership which constituted a cloud upon plaintiffs' title. They prayed for a judgment establishing their title in fee simple, adjudging that defendants had no right or interest therein, and prayed for costs and general relief. After demurring unsuccessfully, defendants answered with a general denial, a deraignment of their title and claim of ownership in fee simple, and a plea of another suit pending between the same parties involving the same controversy. To this answer, plaintiffs replied with appropriate denials and a claim of title through patent from the United States government to the heirs of Maggie Thrasher, deceased, and deeds from Pearl I. Wise and Charles Edward Thrasher.

Nothing further was done in the case for several years, and finally, on May 4, 1916, defendants moved to dismiss plaintiffs' complaint for want of prosecution, which motion was denied. Afterwards, upon leave of court, defendants filed an amended answer consisting of: (1) Denial of plaintiffs' claim; (2) Deraignment of title from the government, substantially as set forth in the original answer; (3) Payment of taxes in good faith for a period of seven successive years under color of title; (4) Estoppel by *res judicata*, in that, in a suit between the Kent Lumber Company and Arthur Clark (who was defendants' grantor) involving title to the same lands, Clark had been adjudged to have a merchantable title in fee simple, and that George H. Saar was identified with the Kent Lumber Company in any title it had or

claimed in the lands and in the prosecution of the suit; and (5) That Saar and wife, if they had any title, were in equity trustees for the defendants with respect thereto, by reason of the fact that, in April, 1909, the Kent Lumber Company had entered into an agreement with Arthur Clark to buy the lands in question for \$12,000; that Clark furnished to the Kent Lumber Company an abstract for examination, and received \$500 earnest money, to be returned, however, if the title proved to be unmerchantable; otherwise to be retained by Clark as a forfeit; that the Kent Lumber Company refused to take the title without excuse, and refused to pay the balance of the purchase money; and that, in the meantime, its attorney, John G. Barnes, counsel for the plaintiff in this action, sought out Charles Edward Thrasher and Pearl I. Wise, and represented to them that Arthur Clark was trying to sell this property and deliver title, and it being claimed that they were the heirs of Maggie Thrasher, to whom the patent from the government actually ran, Clark could not deliver clear title without a deed from them; that Clark had acquired title by devise from Maggie Thrasher to Mary Damburat, her mother, and by deed from Mary Damburat and her husband; that Charles Edward Thrasher and Pearl I. Wise, being then aware of Clark's claim of title and of its history, then stated to said Barnes that they had no interest in or title to the property, but, solely to perfect Clark's title, they would execute deeds therefor; and that they did in fact execute deeds, drawn by said Barnes, running to George H. Saar, for the sole purpose of perfecting Clark's title, for which deeds, and against their protest that they had nothing to sell, the said Barnes paid them each \$25 as a consideration; that Charles Edward

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Thrasher and Pearl I. Wise were ignorant of business affairs, made the deeds without advice, and with the sole intention of curing the title in Arthur Clark, and that the defendants, respondents here, obtained title through Arthur Clark, in good faith, for a valuable consideration, by deed of general warranty. Also, by way of counterclaim, in the event that plaintiffs should prevail, defendants demanded the repayment to them of taxes paid out upon these lands from 1902 to 1915.

Plaintiffs moved to make the answer more definite and certain, and demanded an inspection or copy of a written agreement between Maggie Thrasher and Clark, referred to in the first affirmative defense; and the court having granted the motion to make definite and certain, in part, and denied inspection, a second amended answer was filed, setting up the same defenses as hereinbefore outlined.

Plaintiffs demurred to the fourth and fifth affirmative defenses, as set up in the second amended answer, which demurrers were overruled; and thereafter they replied, with appropriate denials, and set up new matter not inconsistent with their complaint. Thereafter the defendants served and filed forty-four interrogatories, addressed to the plaintiffs, who answered two, and moved to strike all of the remainder. The motion to strike was denied. Plaintiffs failed to answer any of the remaining forty-two interrogatories; and thereafter defendants moved to strike from the files the plaintiffs' complaint, bill of particulars, replies, etc., and asked for judgment of dismissal, and for costs, because of plaintiffs' failure and refusal to answer such interrogatories. This motion was granted, plaintiffs' pleadings were stricken, the case dismissed, and a judgment entered in favor of defendants for costs, from which judgment this appeal is taken.

It is contended that the court erred in permitting defendants to amend their answer, upon the ground that no sufficient showing was made therefor. As no bill of exceptions or statement of facts is brought up, we are unable to determine what was before the trial court at the time the amendment was permitted, and, therefore, we cannot say that the trial court abused its discretion or committed error in this respect.

It is next complained that the court erred in refusing to allow an inspection of the written agreement alleged in the deraignment of title to have been made between Maggie Thrasher and Arthur Clark. But since, on motion being made for such inspection, the defendants struck all reference to the written agreement from their answer, we cannot say that the court erred; and assuredly it did not by its ruling injure plaintiffs, because, in their reply, they set out what purports to be a verbatim copy of this same agreement, and hence needed no inspection.

Nor can we find that the trial court erred in overruling the demurrers to the affirmative answers. The fourth affirmative answer pleads that the judgment in the case of *Kent Lumber Company v. Clark*, was rendered upon the issue of whether or not Arthur Clark, who conveyed to defendant by deed of general warranty, had a merchantable title in fee to the lands in question; and that George H. Saar, one of the plaintiffs in this suit, was identified in interest with the Kent Lumber Company in that suit. We think this answer stated facts constituting a defense, under the law as laid down by this court in *Smalley v. Laugenour*, 30 Wash. 307, 70 Pac. 786; *Nunn v. Mather*, 60 Wash. 484, 111 Pac. 566; and *State ex rel. Olding v. Stampfly*, 69 Wash. 368, 125 Pac. 148.

The demurrer to the fifth affirmative defense was also properly overruled.

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“So property obtained by one through the fraudulent practices of a third person will be held under a constructive trust for the person defrauded, though the person receiving the benefit is innocent of collusion. If such person accepts the property, he adopts the means by which it was procured.” 1 Perry, Trusts (5th ed.), § 211.

See, also, *Hanold v. Bacon*, 36 Mich. 1; *Gates v. Kelley*, 15 N. D. 639, 110 N. W. 770; *Larmon v. Knight*, 140 Ill. 232, 29 N. E. 1116, 33 Am. St. 229; *Rollins v. Mitchell*, 52 Minn. 41, 53 N. W. 1020, 38 Am. St. 519.

After a careful examination of the interrogatories submitted by the defendants, in connection with the defenses raised by the several answers, we are satisfied that they called for the discovery of facts material to support the defenses; and even under the rule laid down by this court in *Lawson v. Black Diamond Coal Min. Co.*, 44 Wash. 26, 86 Pac. 1120, upon which plaintiffs chiefly rely, there was no error in the ruling complained of. The interrogatories calling for facts material to the defenses, and plaintiffs refusing to make answer, the court could not do otherwise than grant the motion to dismiss.

The judgment appealed from is affirmed.

CHADWICK, C. J., MITCHELL, MAIN, and MACKINTOSH, JJ., concur.

[No. 15007. Department One. February 28, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
CHARLES WARWICK, *Appellant*.¹

CRIMINAL LAW (255, 259)—TRIAL—INSTRUCTIONS—UNLAWFUL COMMENT—ASSUMPTION OF FACTS. In a prosecution for assault, an admission by the defendant, that when attacked and struck he threw up his arm to ward off a blow, and thought it struck the arm of the assailant, is not an admission that he used force, and does not, even with the testimony of other witnesses, warrant instructions to the jury assuming that he used force, and the same is unlawful comment on the evidence.

SAME (391-1)—APPEAL—EXCEPTIONS—NECESSITY—RULINGS ON EVIDENCE. Where instructions invade a constitutional right by unlawful comment on the evidence, it is not necessary that an exception be taken and called to the attention of the trial court.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 11, 1918, upon a trial and conviction of third degree assault. Reversed.

Thos. R. Horner, for appellant.

Alfred H. Lundin and *Joseph A. Barto*, for respondent.

MAIN, J.—The defendant in this case was charged with the crime of assault in the third degree. The trial resulted in a verdict of guilty. From the judgment entered upon the verdict, the defendant appeals.

On July the 21st, 1917, and for some time prior thereto, the appellant was and had been living at the Hotel Russell, in Seattle. On the night of that day, the appellant returned to his room at about twelve o'clock and found therein the complaining witness and a woman. The complaining witness he had not known

¹Reported in 178 Pac. 977.

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prior to that time, but the woman apparently was not a stranger to him. They had entered the room without permission from the appellant. The conversation which took place in the room need not be here detailed further than to say that it was not of an ill nature. After a few minutes, the appellant left the room to go to another part of the building and the complaining witness left, apparently to leave the building. The room was on the second floor of the hotel, and was reached by a stairway. A little later, the complaining witness and the appellant met near the head of the stairs. The appellant testifies that he said to the complaining witness:

"I thought you had gone home;" and that, thereupon, the complaining witness applied to him a vile epithet and struck at him, and knocked off his glasses, and "when he went to strike again I threw up my left arm and I think it struck his right arm. He went down the stairs and his hat fell off. I ran down after him and picked up his hat as I went."

The complaining witness testified that when they met at the head of the stairs the defendant applied to him a vile epithet and told him to "get down the stairs," and he further testified:

"When he came down the stairs around the banister, I went down the stairs. When I got to the bottom, the son was there, and hauled off and smashed me in the face here, and cut my lip all open. When I got to the street entrance, the doctor (appellant) overtook me, and had some big heavy instrument or something, and came down on my head."

It was for the assault that occurred on this occasion that the appellant was tried and convicted. The theory of the defense was that the complaining witness had not been struck or assaulted by the appellant. The theory upon which the case was prosecuted

was that the appellant had struck the complaining witness, at the foot of the stairs near the street entrance to the hotel, after he had been first struck in the face by the son. The case was submitted to the jury by the instructions of the trial court upon the theory that the appellant had used force upon the complaining witness, and that the question to be determined was whether such force was justified. After defining the crime of assault, the court in the instructions states: "The defendant admits having used force" on the complaining witness, but claims "that such force as he used was not unlawful, but was in the lawful defense of his own person, and to protect himself against an unlawful assault." Throughout the instructions, the expression recurs that the appellant used force on the complaining witness.

The controlling question is whether it was error for the court to instruct the jury that the appellant admitted that he "used force" on the complaining witness. This is a direct comment upon the evidence, and if it is not justified by the testimony of the appellant himself, it is violative of his rights under article 4, § 16 of the constitution. As we read the evidence of the appellant, it is not to be construed as an admission on his part that he used force. It is true that he testified that he threw up his left arm to ward off a blow directed at him by the complaining witness, after he had been once struck and his glasses knocked off, and that he thought it struck the right arm of his assailant. This language is more restricted than the language used in the instructions. In other words, the trial court, in the language used, went beyond the testimony of the witness. The fact has not been overlooked that two witnesses on behalf of the state testified; one, that the appellant, after the oc-

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currence, had stated to her that he had "hit him," referring to the complaining witness; and the other, that the appellant had said that he had "licked him;" but the testimony of these witnesses did not justify the court in assuming throughout the instructions that the appellant had used force on the complaining witness. Whether he made the declarations referred to, was testimony which the jury had a right to weigh. As to the occurrence at the foot of the stairs, the complaining witness claims he was there struck and assaulted. This the appellant positively denies, and he testified that the injuries were caused by the complaining witness falling on the pavement.

The instructions were a comment on the evidence within the constitutional provision above referred to, and were not justified by the testimony of the appellant. The respondent claims that the error in the instructions is not now open to the appellant because no exceptions were taken thereto which were called to the attention of the trial court, relying upon the general rule in such cases. Where, however, the instructions invade a constitutional right of the accused, it is not necessary, in order to have such error reviewed, that an exception be taken and called to the attention of the trial court. *State v. Crotts*, 22 Wash. 245, 60 Pac. 403; *State v. Jackson*, 83 Wash. 514, 145 Pac. 470; *Eckhart v. Peterson*, 94 Wash. 379, 162 Pac. 551.

The judgment will be reversed and the cause remanded with instructions to the trial court to grant a new trial.

CHADWICK, C. J., MITCHELL, MACKINTOSH, and TOLMAN, JJ., concur.

[No. 15040. Department One. February 28, 1919.]

NICK VLASTELICA *et al.*, Appellants,
v. ANDRIJA BARETICH *et al.*,
*Respondents.*¹

MASTER AND SERVANT (174)—INJURY TO THIRD PERSON—LIABILITY OF MASTER—EVIDENCE—SUFFICIENCY. Where the explosion of a gasoline tank on a boat was caused by the carelessness of a member of the crew in spraying distillate over the deck and over a lighted lantern negligently placed near the opening in the tank, in attempting to transfer the distillate to the boat after being ordered not to do so, defendants, the owner of the vessel and the contracting company furnishing the distillate, having no knowledge of the matter, are not liable for the death of another member of the crew, killed by the explosion.

TRIAL (33)—RECEPTION OF EVIDENCE—REOPENING CASE. It is not error to refuse to reopen a case for further testimony after granting a nonsuit, where the proposed testimony would not have changed the result.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered March 22, 1917, dismissing an action for wrongful death, upon granting a nonsuit, after a trial on the merits to the jury. Affirmed.

Morton T. Hunter and *Davis & Neal*, for appellants.

W. L. Sachse and *Peter David*, for respondents *Baretich et al.*

Hadley & Hadley and *John A. Shackelford*, for respondent *Carlisle Packing Company*.

MAIN, J.—The plaintiffs, minor children of Visco Vlastelica, deceased, bring this action by their guardian *ad litem* for the purpose of recovering damages for the death of their father, which it is claimed, was

¹Reported in 178 Pac. 825.

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caused by the negligence of the defendants Andrija Baretich and the Carlisle Packing Company, a corporation, the wife of Baretich being also joined as a party defendant. After the issues were framed, the cause, in due time, came on for trial before the court and a jury. At the conclusion of the plaintiffs' evidence in chief, the defendants challenged the sufficiency thereof and moved the court to enter a judgment of dismissal. This motion, after argument, was sustained and a judgment was entered dismissing the action. The plaintiffs appeal from the judgment.

The facts are these: The Carlisle Packing Company operates a fish cannery on Lummi Island, in Puget Sound, near the city of Bellingham. The respondent, Baretich, is a fisherman by occupation, and is the owner of the fishing boat "Adriatic" and its equipment. Some time in the early part of July, 1914, Baretich, together with a crew of seven men, left the city of Tacoma on the Adriatic for the purpose of taking fish from the waters of Puget Sound and delivering them to the Carlisle Packing Company. Before having started on this trip, Baretich had contracted to sell whatever fish might be caught to the packing company at a price stipulated. In addition to this price, the packing company was to make him an allowance of \$75 for "oil." By oil was meant distillate, which was used instead of gasoline for motive power. The crew and the owner of the boat operated under an arrangement whereby the profits of the venture were to be divided into a certain number of shares, the number of shares being four greater than the number of men upon the boat. Each man was to receive one share and the four extra shares were to go to the "boat." The crew, other than the owner of the boat, were to bear no part of the losses, if any

occurred, or the expenses, except the cost of provisions and oil.

On August the 10th, 1914, the Adriatic, at about one o'clock in the afternoon, landed at the dock of the packing company adjoining its cannery. No fish, at this time, were delivered from the boat to the cannery. Baretich went to the cannery office for the purpose of collecting or receiving a check for the fish which had been delivered prior to that time. After the bookkeeper gave him the check, he asked about the allowance for oil, and was informed that that could not be paid without consultation with the manager, with whom the arrangement had been made and who was not then at the cannery. Baretich then requested the bookkeeper to furnish him oil in order that he might replenish his supply, preparatory to going out on a trip. The bookkeeper told him to see another employee of the company, who was checking fish that was being then delivered from another boat. Baretich sought this employee and arranged for two drums or barrels of oil. The drums were rolled to the edge of the dock. The Adriatic was moved a short distance from its landing, so that it would be adjacent to the drums. The deck of the boat was two or three feet lower than the dock. Baretich and two members of the crew, Frank Rametich and Slavo Turtanich, prepared to transfer the oil from the drums to the tank on the boat. The tank was below the deck but there extended from it to the surface of the deck a pipe or tube on the top of which was a cap.

Baretich requested the captain of the Carlisle I, a boat owned by the packing company and then at the dock, to bring him a hose. In response to this request, a hose about fifteen or sixteen feet in length and about one inch in diameter, was furnished. The

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cap was removed from one of the drums and also the one from the top of the tube leading to the tank from the deck of the boat. The distillate was to be transferred from the drum to the tank by syphoning. One end of the hose was inserted in the drum, and Turtanich attempted to cause the flow of oil to start by inserting his thumb in the other end thereof and withdrawing it quickly. This method not being successful, he attempted to start the flow by putting the end of the hose in his mouth and attempting to draw the air therefrom, but the flow of oil would not start. Believing that the hose was defective, Baretich requested the captain of the Carlisle I to bring another hose. The captain of this boat went away for the second hose and Baretich went away on an errand to be gone a few minutes. Before going, he told Rametich and Turtanich to "stay quiet until he came back," evidently meaning that they were to make no further effort to transfer the oil from the drum to the tank in his absence.

At the time Baretich went away, there was a lantern on top of the pilot house of the Adriatic, which was several feet above the deck of the boat, being placed there to comply with the regulations of the Federal government, it being at this time between nine and ten o'clock in the evening. Shortly after Baretich went away on the errand as above mentioned, the captain of the Carlisle I brought another hose and went away. At this time there was no one present or assisting in transferring the oil except Rametich and Turtanich. They did not heed the request of Baretich before he went away that they remain quiet, but attempted, in the same manner as before, to start the flow of oil from the drum through the hose. This being unsuccessful, Turtanich took the

hose and put a portion of it in the water, suddenly drawing it out, and in this way hoping to start the oil flowing. At this time the lantern had been taken from the pilot house, by either Rametich or Turtanich, subsequent to the departure of Baretich and the departure of the captain of the Carlisle I, after he had brought the second hose, and placed on the deck of the boat, two or three feet from the opening to the tank. In this had been placed a funnel. Turtanich, who inserted the outer end of the hose in the water, thinking he would get all the salt water out of the hose before putting it over the funnel leading to the tank, as stated in the appellants' brief,

“carelessly sprayed the hose in such a manner that the oil spilled on the deck and sprayed directly over the flame of the lantern. The boat at once caught fire and the tank exploded, and Visko Vlastelica, who had been lying in his bunk, was so burned in getting out of the boat that he shortly thereafter died from such injuries.”

The bunk in which Vlastelica was lying was under the deck in close proximity to the distillate or oil tank. As above stated, the action was brought, claiming that the injuries which Vlastelica sustained from the explosion were proximately caused by the negligence of the respondents. A number of assignments of error are made; but, under the head of “argument,” the appellants' brief states that these are so inter-related that there will be no attempt made in the citation of authorities and argument to draw any very decided line of division in their discussion.

It is a well known rule that negligence in cases of this kind is not presumed. Before a recovery can be had, it is necessary to show that the parties who are sought to be charged with liability have failed in some duty which they owed to the injured person, and that

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the failure to perform such duty was the proximate cause of the injury. The evidence in this case establishes, beyond controversy, that the cause of the explosion which resulted in the injury and subsequent death of Vlastelica was caused by spraying the distillate, as it came from the hose, over the deck and over the lighted lantern, which was in close proximity thereto. The only expert witness produced, a man of large experience in the handling of gasoline and distillate, testified that where no "lights or fire" are around, there is no danger of an explosion in transferring gasoline or distillate in the manner adopted in this case. It is apparent, therefore, that the explosion was caused by the presence of the lantern upon the deck, only a few feet from the opening to the tank in which the funnel had been placed. Neither the packing company nor Baretich, the owner of the boat, had any knowledge that the lantern was moved from its place on top of the pilot house to the deck, until after the explosion. No representative of the packing company was present at this time. Baretich had gone away for a few minutes, directing Rametich and Turtanich to remain quiet until he came back. Upon the trial, appellants made an offer to prove what the custom of the canneries upon Puget Sound was, relative to the character of hose or the device which was used to transfer oil from the drum to the tank on the boat. There was an objection to this line of testimony, which was sustained. In this there was no error because here it is entirely immaterial as to what device other canneries may have used. The explosion was caused, not by the use of the hose without a shutoff, but by reason of the carelessness of Turtanich in spraying the distillate over the deck and over the lighted lan-

tern, which either he or his associate Rametich had caused to be placed near the opening in the tank.

After the court had announced that the motion to dismiss the action would be sustained, the appellants moved the court to re-open the case for the taking of further testimony. This motion was denied. Whether this was an abuse of the trial court's discretion, it is not necessary here to determine. The line of testimony which it was proposed to offer was to the effect that the packing company maintained a station to furnish gasoline and distillate, and that in all cases it furnished the hose by which the gasoline or distillate was to be transferred from the drum to the boat, and that the company had a man in charge of thus delivering gasoline and distillate. Whatever may have been the method of the company in delivering gasoline on prior occasions, the testimony offered would not change, if it had been received, the result in this case. The facts here show that the drums of oil were delivered at the edge of the dock, and that no representative of the packing company took any part in the attempted transfer of the oil, other than that the captain of the Carlisle I, a boat owned by the company, upon request, furnished the hose as above set out.

Appellants' brief states many legal propositions, supported by copious citation of authority with which no issue is taken, but the principles stated are not controlling under the facts of this case.

The judgment will be affirmed.

CHADWICK, C. J., MITCHELL, MACKINTOSH, and TOLMAN, JJ., concur.

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[No. 15124. Department One. February 28, 1919.]

KITTIE MILLER, as *Administratrix etc.*, Respondent, v.
NORTHERN PACIFIC RAILWAY COMPANY,
Appellant.¹

RAILROADS (66)—OPERATION—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE—DUTY TO STOP, LOOK AND LISTEN. The driver of an auto truck is guilty of contributory negligence, precluding recovery for his death, where he drove upon his farm crossing in front of a rapidly approaching passenger train, in the daytime, having a clear view of the train upon a straight track, and did not at any time stop, look or listen.

SAME (62) — OPERATION — ACCIDENTS AT CROSSING — PROXIMATE CAUSE—LAST CLEAR CHANCE. Where the driver of an auto truck drove upon a farm crossing in front of a rapidly approaching passenger train, in the daytime, having a clear view of the train, upon a straight track, and did not at any time stop, look or listen, the doctrine of last clear chance to avoid the accident does not apply, on the theory that his truck had to wait upon a parallel track upon which a freight train half a mile away was approaching, where such train was so far away as not to be a factor, and the trainmen had no reason to believe that the truck, which was moving slowly, would not come to a stop and wait.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered May 27, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death, after a trial on the merits. Reversed.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for appellant.

Gordon & Easterday, for respondent.

TOLMAN, J.—This action was brought to recover damages for the death of John J. Miller, who was killed at a private railroad crossing on his farm, about a half mile south of the town of Sumner, in Pierce

¹Reported in 178 Pac. 808.

county, Washington, on the afternoon of February 4, 1918. From a verdict and judgment against it, appellant brings this case here for review.

The facts appear to be substantially as follows: Appellant maintains a double-track main line of railway between the towns of Puyallup and Sumner, passing through the Miller farm. The farm house is on one side and the barns on the other side of the track; so that the crossing is used considerably and at all hours by persons employed upon the Miller farm. The train which caused Mr. Miller's death was a regular one, was on time, and left Puyallup at 4:16 p. m., being due in Sumner at 4:20 p. m. Wallace Hoyle, an employee of Miller, had driven an auto truck loaded with baled hay from Puyallup, had stopped in the road which parallels the railroad right of way in front of the Miller house, and Mr. Miller had gotten into the driver's seat; and with Hoyle seated beside him at his right, he drove the truck through the gate, and turning toward the right proceeded to climb the approach and cross appellant's tracks. The train was then approaching from the south in full view, at a speed of approximately forty miles an hour, on a perfectly straight track. The evidence is in conflict as to whether or not the whistle had just been blown at the whistling post a few hundred feet south of the crossing, and likewise as to whether or not the bell was ringing.

It is pleaded, and evidence was introduced to show, that a freight train, south-bound, on the opposite or westerly track, was just about leaving Sumner, and at the time of the accident was distant some five hundred to eight hundred yards from the place where the accident occurred; but the speed at which it was traveling is not shown. In its progress, the auto truck

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first came upon the track over which the freight train would pass; and it seems to be conceded that there was not room between the two tracks for the truck to stand in safety. Mrs. Hoyle and her son, who were eye-witnesses, testified that they were standing on the porch of the Miller house, saw and heard the approach of the passenger train, which consisted of an engine, tender, and four coaches only; and that, as the truck reached the westerly or south-bound track, the train was distant from the crossing about two and a half city blocks; that the truck proceeded without stopping onto the easterly or north-bound track; and that, an instant before the impact, Hoyle opened the door of the truck and made a movement indicating an intention to get out.

The engineer and fireman, who were called as respondent's witnesses, testified that the track is straight for a distance of approximately half a mile south from the crossing; that, after rounding the curve onto the straight track, the fireman got down and proceeded to fire the engine; and that, as he stepped up toward his seat, after putting in the fire, at a distance of one hundred and seventy-five to two hundred feet from the crossing, he first saw the truck, which was then proceeding toward the track occupied by the passenger train, and shouted a warning to the engineer, who immediately applied the emergency brakes and used his best efforts to bring the train to a stop. The engineer, because of his position and the projection of the engine and boiler ahead of him, did not and could not see the truck as it approached from his left until just an instant before the impact, when the front end of the truck, passing over the track occupied by the train, came into his view. The truck appears to have been traveling slowly at

all times, two or three miles an hour, according to Mrs. Hoyle's testimony, and there seems to be no doubt that it could have been stopped almost instantly.

During the trial an amendment to the complaint was permitted which alleged that appellant's employees in charge of the locomotive saw the deceased approaching the tracks when he was still six or eight feet west of the west rail of the westerly track, and that it should have been apparent to such employees that the deceased was in ignorance of the approach of the north-bound train and intended to pass on over the tracks; and that they might, with the means then at hand, have given such warning by sharp blasts of the whistle, by ringing the bell or other means, as would have enabled the deceased to have avoided the collision; and, by the exercise of reasonable care, they might have stopped the train, or so reduced its speed, after the presence of the deceased and of his manifest intent to pass over the tracks was known, as to have avoided the accident; and the case was thereafter submitted to the jury upon the last clear chance theory.

Appellant assigns error upon the denial of its motion for nonsuit, interposed at the close of respondent's case in chief, the denial of its motions for an instructed verdict and for judgment *non obstante veredicto*; and, also, upon the giving of instructions relating to the doctrine of last clear chance.

As we read the record, the south-bound freight train, which was just leaving Sumner when the accident occurred, is hardly a factor in the case. There is no evidence that the deceased saw it, and being practically half a mile away when the duty devolved upon the deceased to look and listen for approaching trains, neither the noise occasioned by its operation at that

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distance nor the imminence of its approach were such (if heard and seen) as to in anywise obscure the sight and sound of the much nearer and rapidly approaching passenger train or lead to the belief that both trains would be on the crossing at the same time. Reasonable minds can hardly differ under the facts as shown in drawing the conclusion that a reasonable and prudent man, in the position occupied by the deceased, must have known that he could have stopped his truck upon the westerly track, and have remained there in perfect safety until after the passing of the passenger train, with ample time to put his truck in motion and proceed on his course thereafter, some time before the danger from the approaching freight train could be in anywise imminent. The accident occurred in daylight, in a place where all of the conditions were well known to the deceased. The train which struck him was a regular one running on time. He had a clear, unobstructed view of the track. He traveled, after he turned to go up the incline to the crossing, a distance of some seventy feet nearly at right angles with the approaching train, and had only to lift his eyes to see it. He could have stopped his truck almost instantly, but did not at any time stop, look, or listen. The train was traveling rapidly, was heard by Mrs. Hoyle from her position at the house at about the time it entered upon the straight track, was emitting considerable quantities of black smoke occasioned by the fresh fire just put in by the fireman; and we see no escape from the conclusion that the deceased was guilty of contributory negligence. *Woolf v. Washington R. & Nav. Co.*, 37 Wash. 491, 79 Pac. 997; *Bowden v. Walla Walla Valley R. Co.*, 79 Wash. 184, 140 Pac. 549; *McKinney v. Port Townsend & Puget Sound R. Co.*, 91 Wash. 387, 158 Pac. 107; *Beeman v.*

Puget Sound Traction, L. & P. Co., 79 Wash. 137, 139 Pac. 1087; *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458; *Herrett v. Puget Sound Traction, L. & P. Co.*, 103 Wash. 101, 173 Pac. 1024; *Robison v. Oregon-Washington R. & Nav. Co.*, 176 Pac. (Ore.) 594.

To avoid the force of this contributory negligence, respondent by her trial amendment, sought to take the case to the jury on the last clear chance theory, and it was so submitted. It is argued that, if negligent in driving the truck upon the westerly track in the path of the approaching freight train, deceased was in a position of peril from which he could not extricate himself except by proceeding on across the easterly track, that the engineer and fireman should have appreciated this situation, and it was for the jury to say, under the circumstances, whether or not they could have stopped the train, or so reduced its speed as to permit safe passage to the deceased.

Adhering to the rule, are there any facts here shown which make it applicable? we have already seen that the approaching freight train was so distant as to make it not a factor; and it need not be further considered in this connection. If it should be admitted that it was the duty of the engine-men to keep a lookout at all times, notwithstanding their other duties, and that they saw or should have seen the approaching truck as it turned to climb the incline to the crossing (which is far more than can be claimed), or that they saw the truck when it was still eight feet west of the westerly track, even so, as the truck was traveling at a speed of only two or three miles an hour, and as a matter of common knowledge could have been brought to an almost instantaneous stop, there was nothing to indicate to the engine-men that the deceased would act other than in the usual manner and

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as a prudent man should, by bringing his machine to a stop before entering the danger zone, or at a safe distance from the track occupied by the approaching passenger train. It requires no argument to demonstrate that the engine-men had a right to rely upon this supposition until its fallacy became reasonably apparent, and that, when it could or should have become apparent to them that the deceased was oblivious of the approach of the train or intended in any event to proceed, it was too late to enable them to stop the train or so reduce its speed as to avoid the accident. Having in mind that it was as much the duty of the deceased as it was the duty of the engine-men to avoid the accident, and that the train had the right of way and was traveling at perhaps twenty times the rate of speed of the auto truck, we can see no facts here, nor reasonable inference to be drawn from any of the facts, which justify the submission of the case to the jury.

The judgment appealed from is reversed, with instructions to dismiss the action.

CHADWICK, C. J., MAIN, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15062. Department One. February 28, 1919.]

DOLLY HOYLE, *as Administratrix etc., Appellant*, v.
NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.¹

RAILROADS (66)—OPERATION—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE—DUTY TO STOP, LOOK AND LISTEN. A farm employee who had been driving an auto truck, and who turned the wheel over to his employer just before reaching a farm crossing, retaining a seat beside him, is guilty of contributory negligence, precluding recovery for his death, in failing to keep a lookout and observe a passenger train then due, rapidly approaching from his side upon a straight track in full view.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered July 19, 1918, upon the verdict of a jury rendered in favor of the defendant, in an action for wrongful death, after a trial on the merits. Affirmed.

Bates & Peterson, for appellant.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for respondent.

TOLMAN, J.—This action grows out of the same state of facts as the case of *Miller v. Northern Pac. R. Co.*, ante p. 645, 178 Pac. 808. In this court, the death of Dolly Hoyle has been suggested and permission has been given for the substitution, as party plaintiff and appellant, of G. E. Peterson, who has been appointed by the superior court of Pierce county as special administrator of the estate of Wallace Hoyle, deceased. Appellant's decedent met his death at the same time and under the same circumstances as the decedent in the *Miller* case, and a restatement of the facts here is considered unnecessary. In this

¹Reported in 178 Pac. 810.

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case, the trial court refused to instruct the jury upon the last clear chance doctrine, and the jury found a verdict for the defendant, respondent here.

Appellant relies chiefly upon that refusal so to instruct, but as what we have said in the *Miller* case necessarily disposes of that question here, it follows that there was no error committed in that respect.

Error is also predicated upon an instruction given by the trial court to the effect that, though the truck was driven by Miller, yet if Hoyle was sitting on the seat beside Miller, it was the duty of Hoyle to keep a continuous and vigilant outlook for approaching trains, and he was not relieved from that duty by reason of the fact that Miller was driving the truck; and if Hoyle could have seen the approaching train, had he looked in that direction and in a timely manner, it was his duty to have done so, and to have warned Miller of the danger, and a failure in this respect would be negligence on the part of Hoyle which would defeat his right of recovery. Without in any way imputing the negligence of Miller to Hoyle, we think the facts in this case abundantly establish negligence on the part of Hoyle; and that, to a degree which would well have warranted the trial court in taking the case from the jury; and certainly the instruction given was amply justified. Hoyle had been driving the truck until a few moments prior to the accident, when he surrendered the wheel to his employer Miller, remaining on the seat beside him. He had lived on the Miller farm for more than six months and must have well known all of the conditions. Riding beside the driver, on the side from which the train was approaching, the slightest degree of care for his own safety would have caused him to look for the regular train then due, which always passed that crossing at

a high rate of speed. He did not occupy a position in the truck, or a relationship toward Miller, which would permit him to close his eyes to that which would have been apparent had he looked and rely absolutely upon either Miller or the railroad operatives to protect him from danger. As we view the facts and the inferences to be drawn therefrom, the court should have decided, as a matter of law, that Hoyle was guilty of contributory negligence, and therefore no advantage will flow from a further discussion of the instructions given and refused, upon which all the assignments of error are based.

Judgment affirmed.

CHADWICK, C. J., MAIN, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 15081. Department One. February 28, 1919.]

O. W. AURA, *Appellant*, v. I. E. MARKLE *et al.*,
Respondents.¹

APPEAL (418) — REVIEW — FINDINGS. Findings abundantly supported by the evidence will not be disturbed on appeal, notwithstanding an impolitic remark of the court upon a matter not in evidence.

Appeal by plaintiff from a judgment of the superior court for Snohomish county, Alston, J., entered May 6, 1918, upon findings in favor of the plaintiff, awarding damages for trespass in the amount tendered by defendants, after a trial to the court. Affirmed.

Walter G. Kienstra, for appellant.

C. T. Hardinger, for respondents.

TOLMAN, J.—Appellant was the owner of a tract of four and a fraction acres of land in what was known as the Pilchuck Valley Tracts, in Snohomish county,

¹Reported in 178 Pac. 814.

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Washington, and brought this action to recover the value of timber alleged to have been cut therefrom by respondents in September and October, 1917; and for damages caused to young growing trees by the alleged cutting, and by leaving the tops of the trees which were cut upon the land; alleging that the cutting was wilful, and praying for treble damages under the statute. Respondents answered denying that they knowingly or wilfully cut any timber, and alleged that they, through excusable mistake, cut trees belonging to appellant of the value of \$17.70 only, and that, prior to the beginning of the action, they tendered to appellant the sum of \$80 in settlement of such damages, which tender was renewed in the answer.

The case was tried to the court without a jury, and the trial court found that timber aggregating 35,405 feet, board measure, was cut, that its value was seventy-five cents per thousand, and that the cutting was not casual or involuntary, and that the appellant was entitled to treble damages, or the sum of \$79.66; and recovery for injury to growing trees, and for damages caused by leaving the tops on the ground, was denied. Judgment was entered directing the clerk of the court to pay the appellant the \$80 tendered and deposited in court, and awarding to respondents their taxable costs; from which judgment this appeal was taken.

Errors are assigned as follows: "(1) Inadequate damages appear to have been given under the influence of prejudice. (2) Insufficient evidence to justify the decision and that said decision is against law."

In rendering his decision in this case, the trial court, after discussing the evidence of the several witnesses, said:

"I am familiar with—we all are—with that class of timber and very familiar with the mills that are cutting that, and this is not having any influence, but I say I own four million feet of this kind of timber, right adjoining a mill that has been testified to here, about—accessible to a mill, within half a mile of a mill that is cutting and a splendid road . . . Well now if they give me fifty cents a thousand for that timber I will appreciate it; and when a man says it is worth four dollars he doesn't think so; he is deliberately testifying to something that he does not believe in. So I think seventy-five cents is a very high value for that timber-stumpage, and I shall find it is worth seventy-five cents."

While it was, perhaps, impolitic for the court to disclose and discuss his ownership of timber, yet he expressly prefaced that discussion with the statement: "This is not having any influence." And to be certain that the court was not so influenced, we have carefully read and considered all of the evidence brought here by the record. We find, after a most painstaking consideration, that the evidence abundantly sustains all of the findings of which appellant complains, and that the only finding which might possibly be criticized as being against the weight of the evidence, is that which holds that the trespass was not casual or involuntary. In view of the tender, this, of course, becomes immaterial.

The judgment appealed from is affirmed.

CHADWICK, C. J., MAIN, MACKINTOSH, and MITCHELL, JJ., concur.

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[No. 15112. Department One. February 28, 1919.]

HENRY HUYVAERTS, *Appellant*, v. ANDRE ROEDTZ *et al.*,
Respondents.¹

HUSBAND AND WIFE (75, 77)—COMMUNITY PROPERTY—WHAT LAW GOVERNS. A debt contracted in Illinois and there the separate debt of the husband cannot be satisfied out of community personalty subsequently acquired by the husband and wife after removal to this state.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered February 4, 1918, upon findings in favor of the defendants, dismissing a garnishment, upon overruling plaintiff's demurrer to a complaint in intervention. Affirmed.

Geo. B. Simpson and *John H. Currie*, for appellant.
McMaster, Hall & Drowley, for respondents.

MAIN, J.—The plaintiff, Henry Huyvaerts recovered judgment against the defendant Andre Roedtz, and thereafter caused a writ of garnishment to be issued and served upon one O. F. Johnson. The garnishee answered the writ to the effect that he had certain funds in his possession which were the property of Emma Roedtz, the wife of the defendant Andre Roedtz. This affidavit was controverted. Mrs. Roedtz filed a complaint in intervention, to which the plaintiff demurred. The demurrer being overruled, the plaintiff elected to stand thereon and refused to plead further. Judgment was entered discharging the garnishee. From this judgment, the plaintiff appeals.

The facts necessary to present the controlling questions are these: The transaction which was the

¹Reported in 178 Pac. 801.

basis of the judgment in the principal action occurred in the state of Illinois, where the parties at that time resided. Thereafter, Mr. and Mrs. Roedtz moved to this state and accumulated certain community property. The funds derived from the sale of this property was sought to be reached while in the possession of the garnishee defendant. Under the laws of Illinois, the debt there contracted and which was the basis of the judgment in the principal action, was the separate debt of the husband. In that state there was no community law.

The sole question here for determination is whether community personal property in this state can be taken to satisfy the separate debt of the husband, contracted in the state of Illinois, in which state there was no community law.

The debt, being the separate debt of the husband in the state where it was contracted, was likewise his separate debt when judgment was obtained thereon in this state. The character of the debt is determined by the law of the place where it arose. *La Selle v. Woolery*, 14 Wash. 70, 44 Pac. 115, 53 Am. St. 855, 32 L. R. A. 75.

The debt, being the separate debt of the husband, cannot be satisfied out of the community personal property. *Schramm v. Steele*, 97 Wash. 309, 166 Pac. 634.

The trial court properly held that the funds above mentioned were not subject to garnishment.

The judgment will be affirmed.

CHADWICK, C. J., MACKINTOSH, MITCHELL, and TOLMAN, JJ., concur.

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Statement of Case.

[No. 15171. Department One. February 28, 1919.]

E. W. McCONNELL, *Appellant*, v. GORDON CONSTRUCTION
COMPANY *et al.*, *Respondents*.¹

CONTRACTS (87) — CONSTRUCTION — SUBJECT-MATTER — PLANS FOR BUILDING—GUARANTY OF SUFFICIENCY. In an action to recover damages from the collapse of a building constructed for plaintiff by defendant, it is error to permit the defendant to introduce evidence of the inadequacy of the plans, where the defendant had contracted to furnish the plans and thereby vouched for their adequacy.

EVIDENCE (175)—PAROL TO VARY WRITING—AMBIGUITY. Defendant's contract to "furnish" the plans for a building to be constructed for plaintiff, is not so indefinite or ambiguous as to permit oral evidence to show that plaintiff was familiar with the plans and as a matter of fact furnished them and so would be responsible for their inadequacy.

CONTRACTS (164, 176)—DEFENSES—ISSUES AND VARIANCE. In an action to recover damages for the collapse of a building constructed for plaintiff by defendant, the defenses of inadequacy of the plans and that the building collapsed by reason of additional weight imposed by plaintiff's change of the plans, are of the same nature, and if only one of them was raised by affirmative defense, the defendant should not be heard to say that the other was raised and could be presented under the general denial, where the case had been at issue for months while plaintiff's evidence was being taken by deposition, and nothing in the pleadings or at the trial specially suggested any such defense until the opportunity to guard against it had virtually passed.

INTEREST (7)—DEMANDS NOT LIQUIDATED. In an action for damages from the collapse of a building interest is recoverable only from the date of the judgment.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 20, 1918, upon the verdict of a jury rendered in favor of the defendant, in an action for damages for breach of contract. Reversed.

¹Reported in 178 Pac. 823.

Hughes, McMicken, Ramsey & Rupp and John P. Garvin, for appellant.

Edwin H. Flick and Peters & Powell, for respondents.

MACKINTOSH, J.—The respondent, Gordon Construction Company, at Seattle, on November 3, 1909, wrote to the appellant at Denver, Colorado, a letter offering to construct for him a building substantially a reproduction of one then situated at the Alaska-Yukon-Pacific Exposition, in Seattle. This letter contained the following:

“We will furnish drawings and specifications by Harry Weatherwax . . . and furnish all material and labor and construct for you the ‘Monitor and Merrimac’ building, as per Weatherwax’s plans . . . We will build in a substantial and workmanlike manner the ‘Monitor and Merrimac’ building, which will be a substantial reproduction of the ‘Monitor and Merrimac’ building on the ‘Pay Streak’, A.-Y.-P. Exposition, with some additions and changes, as follows: . . . ”

The offer contained in this letter was accepted by the appellant, and the respondent construction company proceeded with the construction of the building, having furnished a bond guaranteeing the faithful performance of the contract with the respondent insurance company as surety. The construction company completed the building and turned the same over to the appellant. Ten days later the building suddenly collapsed. The appellant reconstructed the building, and instituted this action to recover the cost of such reconstruction, and the damages resulting from the collapse.

The appellant’s complaint was based upon his allegation that the construction company had improperly

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constructed the footings under the three columns supporting the two trusses which carried the principal weight of the structure; that, according to the plans and specifications, these footings should have had a bearing surface of twenty square feet; whereas, in fact, they were originally constructed with a bearing surface of only sixteen square feet and subsequently new concrete was added to make them of the required area, and the columns supporting the trusses were then placed directly over the union between the old and new concrete, which resulted in the breaking of the footings at the point of union. The construction company admitted the collapse of the building, and in a general denial denied the allegations of negligence; and, as an affirmative defense, alleged that the collapse was caused by the addition of two tons of weight upon the trusses by reason of changes of construction ordered by the appellant. This affirmative matter was denied in the reply.

The appellant's testimony was taken by depositions, and several months were consumed in preparing the case for trial, and during this time and while the appellant's testimony was being produced before the jury, the respondent construction company gave no intimation that any other issue than that especially raised by the pleadings was to be presented. The construction company, however, was allowed, when presenting its defense, to introduce evidence that the plans were inherently defective in that the trusses were insufficient, as designed, to carry the weight which, of necessity, they must bear. This testimony was introduced over the objection of the appellant that the construction company, having furnished the plans, was liable for any defects therein, and would be responsible for the collapse of the building if it were

occasioned by the inadequacy of such plans. Further objection was made to the introduction of this evidence upon the ground that it had not been affirmatively pleaded as a defense. The construction company was also allowed to introduce evidence showing an additional weight of seventeen tons to have been placed upon the trusses, this weight having been imposed by changes not contemplated by the plans but ordered during the construction of the work by the appellant. Objection was made to this testimony on the ground that the affirmative defense only claimed that an additional weight of two tons had been added. A verdict was returned against the appellant, and in favor of the respondent upon a counterclaim which had been interposed for extra work done.

The testimony introduced respecting the adequacy of the plans should have been excluded for two reasons; the first being that the contract between the parties having called for the furnishing of the plans by the respondent construction company, thereby that company vouched for the adequacy of the plans and cannot now raise any question thereto. Where either party to a building contract agrees to furnish, and does furnish, the plans for a building, he thereby guarantees their sufficiency for the purpose. *Huetter v. Warehouse & Realty Co.*, 81 Wash. 331, 142 Pac. 675, L. R. A. 1915C 671. The respondent offered the testimony upon the theory—which the trial court adopted—that the word “furnish,” as used in the contract, was so indefinite or ambiguous as to allow the production of parol testimony to explain it, and under this ruling the respondent construction company was allowed to show that the appellant was familiar with the plans at the time the contract was entered into; and that, as a matter of fact, instead of the respond-

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ent furnishing the plans, the appellant himself was furnishing them. The word used is an ordinary word of common use and has a well defined, easily understood meaning, and to allow parol testimony to explain it, would be to violate the fundamental rule in regard to the varying of the terms of a written contract. The court was in error in the admission of testimony in this respect and in submitting to the jury the question of the interpretation to be placed upon the contract in regard to the furnishing of the plans. The contract having stipulated for the plans to be furnished by the respondent construction company, it cannot now question the adequacy of such plans.

The second reason why this testimony was inadmissible is that assigned by the appellant in his objection to it. The case had been at issue under the pleadings as framed by the parties for many months, both parties had attended and taken depositions, and the trial had proceeded to the point where the respondents were about to introduce their testimony before the appellant was apprised of the fact that any defense other than that suggested in the affirmative defense was to be relied upon. If the defense of inadequacy of the plans had been otherwise admissible, it was of the same nature as the defense that the collapse of the building was occasioned by the additional weight imposed by reason of the appellant's changes of construction. If these were matters which could not properly be raised by general denial, then each of them should have been pleaded as an affirmative defense. If, however, they were both issues presentable under the general denial, as is claimed by the respondents, then the fact that one of them was specially plead, and the presentation of the other was neither specially made in the pleadings nor in any

way called to the attention of the opposing party until the opportunity to guard against the defense had virtually passed and this had resulted in so embarrassing the appellant in the trial of his case, then the respondents, in good conscience, should not be permitted to pursue such a course of conduct. Having entered, in addition to the general denial, an affirmative defense, the respondent upon the trial should not be permitted to offer testimony as to any other defense; for by its conduct it has elected to take one of those matters which, under its own theory, was properly at issue under the general denial, and has presented it as an affirmative defense and has thereby misled the appellant, who had a right to assume from the pleadings that the defense to be made to its cause of action was the one stated affirmatively in the answer; and not only from the pleadings but from the respondent's conduct of the trial, it was presupposed that the only defense was that the trusses without the additional weight claimed to have been imposed upon them by appellant were adequate. Having qualified their general denial by specially pleading this defense, the respondents thereby tendered a specific issue, and they will not now be heard to say that they relied upon the general issue raised by the general denial. To allow it to do otherwise would be to set a trap for the unwary. Had the respondents desired to present the defense of the additional weight of the trusses and the inadequacy of the plans, had they both been properly presentable, they should either have rested upon the general denial; or, if they chose, plead them both specially. The method which they did pursue amounted to a contradiction of defenses and was in the nature of a subterfuge which could not but surprise and mislead the appellant. *Ball v. Beaumont*, 63 Neb. 215, 88 N. W. 173.

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The appellant also complains that the respondent should not have been permitted to show that an additional weight of seventeen tons was imposed upon the trusses. In view of the fact that the case must be sent back for a retrial, this assignment of error does not become material, for the reason that the respondent may now amend its answer to conform to the proof and the appellant will have an opportunity in preparing his case anew to introduce such evidence as he may see fit to meet the issue as it is now presented.

The appellant has further objected to the verdict against him for the reason that there was no competent evidence of the value of the extra work for which the jury found him liable. This presents a question of fact, and from an examination of the record, we are satisfied the jury was in possession of sufficient facts to justify a return of the verdict.

The judgment as it stands carries interest from the date of the collapse of the building. This is erroneous, as interest should only be allowed from the date of the judgment. *Wright v. Tacoma*, 87 Wash. 334, 151 Pac. 837.

For the reasons stated, the judgment of the lower court will be reversed and the case remanded for a new trial.

CHADWICK, C. J., TOLMAN, MITCHELL, and MAIN, JJ., concur.

[No. 15198. Department One. February 28, 1919.]

S. B. REYNOLDS *et al.*, *Respondents*, v. PACIFIC MARINE
INSURANCE COMPANY, *Appellant*.¹

APPEAL AND ERROR (175)—TIME FOR TAKING—EFFECT OF MOTIONS. Where a verdict was rendered April 24th and judgment withheld pending motions for judgment *non obstante* and for a new trial, until June 24th when the first judgment was entered, an appeal notice served September 19 and filed September 21, is within the ninety days limited by law.

INSURANCE (51)—CONSTRUCTION OF CONTRACT—TERM—VOYAGE IN MARINE POLICY. A marginal clause in a policy of marine insurance limiting the policy to the waters of southeastern Alaska, delivered after the sailing of the vessel, will prevail, although unknown to the owners, unless there are facts that estop the company from reliance on the provision.

SAME (10, 109)—AGENTS OR BROKER—RELATION TO PARTIES—STATUTES—KNOWLEDGE IMPUTED. Under the insurance code, Rem. Code, § 6059-1 *et seq.*, defining an "agent" as the person appointed and authorized to solicit applications and effect insurance, and a "broker" as a person not appointed who acts or aids in any manner in negotiating contracts of insurance for a party other than himself, and requiring larger license fees for brokers than for agents, an insurance concern that makes application to the agents of the company for a policy of marine insurance is a broker and acts as agent of the owners of the boat, so that its knowledge would not be imputed to the company.

SAME (108)—AGENTS—NOTICE—RELIANCE ON APPLICATION. Where a broker's application for marine insurance expressly specified that the boat was not to be employed in the waters of southwestern Alaska, and the surveyor's report gave the employment of the boat as both the waters of southeastern and southwestern Alaska, the agents of the company writing the insurance were not bound to make inquiry as to whether the insurance desired was that applied for, but were entitled to rely on the application, the rate of insurance being different.

Appeal from a judgment of the superior court for King county, Ralston, J., entered June 24, 1918, upon the verdict of a jury rendered in favor of the

¹Reported in 178 Pac. 811.

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plaintiffs, in an action on a policy of marine insurance, after a trial on the merits. Reversed.

Bogle, Merritt & Bogle, for appellant.

Myers & Johnstone, for respondents.

MAIN, J.—This action was brought by the plaintiffs as owners of the gasoline boat "Arnold", against the Pacific Marine Insurance Company, the defendant, on a policy of marine insurance. After the issues were framed, the cause came on for trial before the court and a jury. The trial resulted in a verdict in favor of the plaintiffs. The filing of the verdict and the entry of the judgment were ordered withheld pending the ruling of the court on the defendant's motion for judgment notwithstanding the verdict. Motion for a new trial was also made. Both the motions were by the court denied, and a judgment entered upon the verdict, from which judgment the defendant appeals.

The respondents open their brief with a motion to dismiss the appeal, claiming that the notice of appeal was not taken within the ninety days allowed by law. The verdict was rendered on the 24th day of April, 1918, and was ordered withheld from filing, pending a ruling on the motion for judgment notwithstanding the verdict. A motion for a new trial was also made. On the 19th day of June, 1918, an order was entered overruling both motions. On June 24th, 1918, a judgment was entered on the verdict. This is the first judgment that was entered. The notice of appeal was served on the 19th day of September, 1918, and filed on the 21st of that month. From these facts it is plain that the appeal was taken within ninety days from the entry of the judgment.

The facts in this case are in many respects the same as those recited in *Reynolds v. Canton Insurance Co.*,

98 Wash. 425, 167 Pac. 1115. The action is brought by the same parties, but against a different insurance company. It is for recovery for the loss of the Arnold by fire, which is the same boat and the same fire for which recovery was had in that case upon a policy of marine insurance issued by the Canton Insurance Company. In some respects, however, the facts in this case are materially different from those in the case referred to. This difference will be subsequently pointed out.

The facts which present the questions to be determined in this case may be recited as follows: On April 23, 1915, S. B. Reynolds and William Valen were the owners of the Arnold which was employed in carrying freight and passengers to Alaskan ports. On this day, or a day or two later, Reynolds applied to Norman Waterhouse & Company, a corporation, for insurance covering the Arnold in the sum of \$5,000. The application recited:

“Have this Policy specify that the said Launch will sail from Seattle, Washington, to Cape Yagataga, Seward, Cook’s Inlet, plying between said ports and other waters of South Eastern Alaska”.

When the insurance was written, the policy or policies were directed to be delivered to the National City Bank, in Seattle. Waterhouse & Company caused the boat to be surveyed for the purpose of determining its seaworthiness. \$2,000 of the insurance was written in the Canton Insurance Company, of which Waterhouse & Company was then the agent. It was this policy that was involved in the case above referred to. On April 30th, 1915, Waterhouse & Company applied to the firm of Bowden, Gazzam & Arnold for a policy in the sum of \$1,000 in the Pacific Marine Insurance Company, the appellant. At this time

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Bowden, Gazzam & Arnold were not the licensed recording or policy writing agents of the appellant, but were in some respects agents. The application by that firm was submitted to the home office of the company in Vancouver, B. C. The application was approved and a policy written for \$1,000. The application which Waterhouse & Company presented to Bowden, Gazzam & Arnold contained this recital:

“Warranted during the currency of this policy vessel to be employed in the waters of Puget Sound, British Columbia and Southeastern Alaska”.

The application was for insurance for the period of one year from April 30th, 1915. The policy written covered this period and contained, on the margin of the face of the policy, a recital as follows:

“Warranted to be employed during the currency of this policy in the waters of Puget Sound, British Columbia and Southeastern Alaska, inland waters not north of Wrangel Narrows”.

The recital in the application and this recital on the margin of the policy are substantially to the same effect, which was that the boat was not to be covered by the policy if it was employed beyond the waters of Southeastern Alaska. In connection with making the application for the \$1,000 insurance in the Pacific Marine Insurance Company, Waterhouse & Company submitted to Bowden, Gazzam & Arnold the surveyor's report covering the gas boat Arnold. This report was on a printed blank form and covered many details. On the line after the word “employment” in the report appeared this: “General trading, SouthE Alaska, Yakutat and Seward.” Yakutat and Seward were in Southwestern Alaska. Waterhouse & Company was not the agent for the Pacific Marine

Insurance Company and was not known in the transaction by that company.

On July 21st, 1915, the Arnold, while near the entrance to Cook's Inlet and beyond the trading limits specified, both in the policy and in the application by Waterhouse & Company to Bowden, Gazzam & Arnold, was destroyed by fire. The location of the boat at the time of its destruction was in what is known as the waters of Southwestern Alaska.

The facts in this case differ from the facts in the *Canton* case in this: There the application was made by Reynolds to Waterhouse & Company, the agent of that insurance company. Here, the application was made by Waterhouse & Company, not an agent of the Pacific Marine Insurance Company, to Bowden, Gazzam & Arnold, as agents of that company, for the policy of insurance. The policy, after it was written, was forwarded to Bowden, Gazzam & Arnold, and by that firm delivered to Waterhouse & Company, who in turn delivered it to the National City Bank. When the policy was delivered, the boat had sailed on its last voyage and neither of the owners thereof knew of the marginal clause limiting the policy to the waters of Southeastern Alaska. This clause in the policy will prevail, and there is no liability, unless there are facts which would estop the company from reliance on that provision.

It may be admitted that, if Waterhouse & Company was the agent of the Pacific Marine Insurance Company, as related to this policy, under the evidence, the question of whether or not the insurance company was estopped would be one of fact for the jury and the verdict would be controlling. On the other hand, if Waterhouse & Company, so far as this policy is concerned, operated as a broker and was thereby the

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agent of the owners of the boat, the knowledge of that company would not be imputed to the Pacific Marine Insurance Company. It becomes important, then, to determine whether Waterhouse & Company was a broker in this transaction, or became an agent.

In 1911, the legislature enacted what is known as the insurance code. Laws of 1911, Ch. 49, p. 161 (Rem. Code, § 6059-1 *et seq.*) Section 2 (Id. § 6059-2), is largely, if not entirely, devoted to the defining of terms which are used throughout the act. "Agent" or "Insurance Agent" is there defined as a person duly appointed and authorized by an insurance company, to solicit applications for insurance and to be known as "a soliciting agent", or to solicit applications and effect insurance in the name of the company, to be known as "a recording or policy writing agent". The term "Broker" or "Insurance Broker" is defined as a person, not being an appointed agent for the company in which insurance or reinsurance is effected, who "acts or aids in any manner in negotiating contracts of insurance or reinsurance or placing risks or effecting insurance or reinsurance for a party other than himself or itself". Section 17 (Id., § 6059-17), contains a schedule of fees covering, among other things, agent's licenses. The broker's license fee is much larger in amount than the others. Section 20 (Id., § 6059-20), among other things, provides that each and every broker, etc., doing business in this state "shall be subject to and governed by this act". Section 36 (Id., § 6059-36), provides that it shall be unlawful for any insurance company admitted to do business in this state, to write any policy of insurance covering risks located in the state, "except through or by a duly authorized licensed agent of such company residing and doing business in this

state". Section 44 (Id., § 6059-44), provides that every insurance agent shall annually, on or before the first day of April, procure a license from the insurance commissioner. In section 100 (Id., 6059-100), it is provided that any person or party who solicits fire, marine, etc., business, to be placed in an insurance company other than represented by him shall be deemed and considered as transacting a "brokerage business and shall be required to procure a broker's license." This section contains a proviso which it is unnecessary here to note because it does not apply to the facts in this case, as Bowden, Gazzam & Arnold were not licensed recording agents of the appellant.

Under this statute, it must be held that Waterhouse & Company in the transaction here involved, was acting as a broker. The purpose of the legislature apparently was to enact a complete insurance code which would cover the entire subject of insurance, as pointed out in *Davis-Kaser Co. v. Colonial Fire Underwriters Ins. Co.*, 91 Wash. 383, 157 Pac. 870, and in *State ex rel. North Coast Fire Ins. Co. v. Schively*, 68 Wash. 148, 122 Pac. 1020. The act expressly defines both insurance agents and brokers, requires that each, before doing business, shall obtain a license, and fixes the fees therefor. The undisputed facts show that Waterhouse & Company, under the provisions of the statute, was in relation to the transaction now before us, acting as a broker. Being a broker in this transaction, it was the agent of the owners of the boat when the application to Bowden, Gazzam & Arnold was made for the policy of insurance in the Pacific Marine Insurance Company. Any knowledge that had been conveyed to Waterhouse & Company but of which Bowden, Gazzam & Arnold knew nothing, could not be imputed to the appellant. Bowden, Gaz-

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zam & Arnold had no knowledge of the employment of the boat or what the owners thereof desired in the matter of insurance, except what was conveyed to them through the application made by Waterhouse & Company and the surveyor's report. They did not know, and were not charged with knowledge, that Reynolds had made written application to Waterhouse & Company for insurance upon the boat while it was in the waters of Southwestern Alaska.

Without defining the exact relations existing between Bowden, Gazzam & Arnold and the Pacific Marine Insurance Company, it may be said that it will be here assumed that any knowledge which that company possessed should be imputed to the appellant. The question then arises whether these agents of the appellant knew, or were charged with knowledge, that the owners of the boat contemplated employing it, during the period covered by the policy, in the waters of Southwestern Alaska, and desired the insurance to cover the boat while in those waters. To determine this question requires a consideration of the matters which were brought to the attention of Bowden, Gazzam & Arnold and the duty which such facts imposed upon that firm.

Waterhouse & Company being a broker representing the owners of the boat, had made a written application to them for the insurance, and expressly specified that the boat was not to be employed in the waters of Southwestern Alaska, where it was destroyed. The surveyor's report gave the employment of the boat as both the waters of Southeastern and Southwestern Alaska. Did it then become the duty of Bowden, Gazzam & Arnold to disregard the express statement in the application made by Waterhouse & Company, the agent of the respondents, as to what waters the

policy was to cover, and make an inquiry as to whether the insurance desired was that applied for, since the surveyor's report recited the employment as being both the waters of Southeastern and Southwestern Alaska? The rate of insurance for the two waters was different, that for Southwestern Alaska being higher.

Bowden, Gazzam & Arnold were not charged with knowledge that the owners of the boat were contemplating a voyage to Southwestern Alaska. They had a right to assume that the application which they had received from the agent of the owners stated the kind of a policy that they desired, and the waters in which the boat would be covered by the insurance. They were not required to assume that different insurance was desired than that specified in the application, and were justified in causing the policy to be written in accordance with the application.

As we view the record, there is no substantial dispute in the controlling facts. There was no question to submit to the jury which would make the verdict controlling. Since Bowden, Gazzam & Arnold had no knowledge of the employment of the boat, or what waters the owners thereof desired the insurance to cover, except that contained in the application and the surveyor's report, and there being no material dispute of fact, we are of the opinion that the verdict and judgment cannot be sustained. Since, under the statute, Waterhouse & Company was a broker, it becomes unnecessary to review the decisions cited in the briefs to determine whether, prior to the enactment of the statute, it would be considered an agent or a broker.

Much reference is made in the briefs to the case of *Reynolds v. Canton Ins. Co.*, above referred to, but

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in that case, as already pointed out, Waterhouse & Company was the agent of the company in writing the policy upon which the action was based, while here it was a broker. There Waterhouse & Company, the agent of the insurance company, knew, or at least the jury had a right to find that it knew, that the boat was contemplating a voyage that would take it to the waters of Southwestern Alaska, and that its owners desired the insurance to cover it while in those waters. What is said in that case must be read in the light of the facts then before the court.

The judgment will be reversed and the cause remanded, with directions to the superior court to dismiss the action.

CHADWICK, C. J., MACKINTOSH, MITCHELL, and TOLMAN, JJ., concur.

[No. 15220. Department One. February 28, 1919.]

THE STATE OF WASHINGTON, *on the Relation of*
American Piano Company et al., Plaintiff, v.
THE SUPERIOR COURT FOR KING COUNTY,
*John S. Jurey, Judge, Respondent.*¹

GARNISHMENT (2)—GROUNDS—EXISTENCE OF "DEBT"—STATUTES. Under Rem. Code, § 680, authorizing a garnishment (1) where an original attachment has been issued, and (2) where plaintiff sues for a "debt," the term "debt" is not limited to sums due on express contract, but is as broad as the term "indebtedness" in the attachment law, construing the statutes as *in part materia* and tracing the history of legislation on the subject.

STATUTES (71)—CONSTRUCTION—REFERENCE TO OTHER ACTS. The attachment and garnishment acts, the latter authorizing garnishment where a writ of attachment has issued, are to be considered as *in part materia*.

GARNISHMENT (2)—ACTIONS IN WHICH AUTHORIZED—CONVERSION—WAIVER OF TORT. Garnishment lies in an action to set aside a preference under the bankruptcy act, since the tort may be waived and the action based upon implied contract to repay the money obtained, the taking of which was a conversion.

Application for a writ of prohibition, filed in the supreme court January 14, 1919, to prohibit further proceedings in garnishment in the superior court for King county, Jurey, J. Denied.

E. P. Whiting, for relators.

Charles H. Hartge and *Preston, Thorgrimson & Turner*, for respondents.

TOLMAN, J.—On or about the 23d day of August, 1918, one W. W. Hay, as trustee in bankruptcy of Jones-Rosquist Piano Company, commenced an action in the superior court for King county against the relators herein, for the purpose of recovering a judgment for \$4,000 and interest, alleged to be the value

¹Reported in 178 Pac. 827.

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of certain personal property transferred by said Jones-Rosquist Piano Company, while insolvent, and within four months prior to its being adjudicated a bankrupt, alleging knowledge of such insolvency on the part of relators, and that such transfer created an unlawful preference in favor of the relators under the terms of the bankruptcy law.

At the same time, an affidavit for garnishment was filed, garnishment writs were issued and served upon numerous garnishee defendants, two of whom answered, one admitting an indebtedness to the relator J. H. Shale, as trustee, and the other admitting possession of certain personal property belonging to the relator American Piano Company.

Relators, defendants in the original action, being nonresidents of the state, service was sought to be obtained by publication of summons; and thereafter relators appeared in that action specially only, and moved the court to quash the purported service of summons upon each of them and to quash the writs of garnishment, for the reason alleged that such writs were unlawfully issued, and the court was without jurisdiction in the premises. The motions to quash being denied, relators come here seeking a writ of prohibition forbidding further proceedings in the cause.

The sole question raised by the petition is whether or not the writs of garnishment were lawfully issued. If so, the superior court has jurisdiction to proceed; if not, it has no jurisdiction, and can acquire none by the publication of summons. The garnishment statute, Rem. Code, § 680, provides that the clerks of superior courts may issue writs of garnishment:

“(1) Where an original attachment has been issued in accordance with the statutes in relation to attachments;

“(2) Where the plaintiff sues for a debt and makes affidavit that such debt is just, due and unpaid, and that the garnishment applied for is not sued out to injure either the defendant or the garnishee.”

And it is argued here that the word “debt”, in its legal acceptation, has a clear and definite meaning, defined by Blackstone as:

“The legal acceptation of *debt* is, a sum of money due by certain and express agreement: as, by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it.” 3 Blackstone’s Commentaries (Lewis ed.), *154.

And such, no doubt, is the technical meaning of the word. But is it used in that narrow and restricted sense in our garnishment statute? Prior to the act of 1893, garnishment was effected only under a writ of attachment or an execution. And in all cases where a writ of attachment issued, debts, credits, and other personal property incapable of manual delivery, might be attached by serving an attachment writ upon the person having possession of such personal property. 2 Hill’s Code, § 300. But unless ground for an attachment existed, or the creditor had reduced his claim to judgment, there was no method by which the creditor could reach and hold money or property belonging to the debtor in the hands of a third person.

The attachment act prior to 1893, as now, required that an indebtedness exist in favor of the attaching creditor; and by the garnishment act of 1893, it clearly appears that the legislature did not intend to restrict any right then existing, because it clearly preserved all existing rights by providing, in subdivision one as heretofore quoted, that the writ of garnishment should issue in all cases where an original

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attachment had issued; and then, to enlarge the scope of the writ, provided in subd. 2, in effect, that, when no ground for attachment existed, yet the writ should nevertheless issue where the plaintiff sues for a debt. We are convinced, therefore, that the word "debt" in the garnishment act was intended to mean the same identical thing as the word "indebtedness" in the attachment act. In 36 Cyc. 1147, it is said:

"Statutes *in pari materia* are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time."

And again, at page 1150 of the same volume:

"Whenever a legislature had used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using it in the same sense, unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby."

To hold that the writ of garnishment will issue only when a debt exists, in the technical sense of the term, would be clearly to deny the plain legislative intent and to limit the office of that writ unduly. Holding, then, that the word "debt" in the garnishment act is as broad as the word "indebtedness" in the attachment act, we come to the real question in this case, which is, Will either attachment or garnishment lie

in an action brought to set aside a preference under the bankruptcy act? Cases are not wanting which hold that the wrongful conversion of personal property will not authorize the issuance of a writ of attachment, and that one may not waive the tort and sue in *assumpsit* so as to give jurisdiction. See *Finlay v. Bryson*, 84 Mo. 664; *Sonnesyn v. Akin*, 12 N. D. 227, 97 N. W. 557; *Welch v. Renfro*, 42 Tex. Civ. App. 460, 94 S. W. 107; *Baxter v. Nash*, 70 Minn. 20, 72 N. W. 799. Upon the other hand, the great weight of authority, and the better reasoning, we think, is evidenced by the more modern doctrine, to the effect that, under statutes limiting the right of attachment to suits on claims arising on contract, the tort may be waived, and the claim will be considered as arising from an implied contract. In *Judge v. Curtis*, 72 Ark. 132, 78 S. W. 746, it is said:

“Ordinarily a plaintiff in a suit for conversion may waive the tort, and rest upon the right the law gives him against one who has deprived him of his property, or some right in respect thereto. This obligation of the conversion which the law imposes upon him is an implied contract, and, waiving damages for the tort, the plaintiff recovers, if at all, on this implied contract. Whether or not in any given case the tort may be waived, and the implied contract remain, depends upon the facts and circumstances of the case. The rights and obligations of the parties, as well as the remedy, are to be determined by the nature of the transaction involved. The cause of action which the plaintiff has against another for taking and disposing of his property is but a demand arising upon a contract, not express, but one which the law implies, and makes binding upon the wrongdoer. There is apparently some conflict in the authorities on the subject, but the conflict is more apparent than real, for the difference is, after all, a difference in the facts in the cases adjudicated, or mainly so, at least.”

In *Felker v. Douglass* (Tex. Civ. App.), 57 S. W. 323, it is said:

"The appellant complains that the court erred in overruling the motion to quash the writ of attachment, on the ground that the claim of plaintiff was for the wrongful conversion of ties, sounding in tort, upon which an attachment would not lie. The general rule is that a writ of attachment will not issue in an action for damages where the claim is unliquidated and uncertain. This rule does not apply where there is a wrongful conversion of property, where its value can be fairly approximated. The claim of plaintiff in this case was for certain cross-ties wrongfully taken, the number and value being definitely stated in the petition. Under such circumstances, there is an implied promise to pay the value of the property when taken, and the demand is of such certainty as to form a basis for the issuance of the writ."

In *Barth v. Graf*, 101 Wis. 27, 76 N. W. 1100, it is said:

"This court has repeatedly held that, where money or property has been wrongfully converted, the owner may waive the tort, and recover the amount of the money or the value of the property so converted upon an implied contract. *Norden v. Jones*, 33 Wis. 600; *Smith v. Schulenberg*, 34 Wis. 41; *Walker v. Duncan*, 68 Wis. 624, 32 N. W. 689; *Lee v. Campbell*, 77 Wis. 340, 46 N. W. 497; *Van Oss v. Synon*, 85 Wis. 661, 56 N. W. 190. So, it has been expressly held by this court that, where money has been obtained by false representations, the party defrauded may waive the tort and recover upon an implied contract to repay the money so obtained, and may properly have an attachment in such action to enforce such repayment. *Western Assurance Co. v. Towle*, 65 Wis. 247, 254, 26 N. W. 104. That case has been expressly approved in other states. *Hart v. Barnes*, 24 Neb. 782, 40 N. W. 322; *Farmers' Nat. Bank v. Fonda*, 65 Mich. 533, 32 N. W. 664. In this last case, it was held, under a statute like ours, that a suit in attachment lies upon the

implied *assumpsit* arising out of the embezzlement by a clerk of the money of his employer, such a case falling within the language of the attachment act."

To the same effect, also, see: *Lipscomb v. Citizens' Bank of Galena*, 66 Kan. 243, 71 Pac. 583; *May v. Disconto Gesellschaft*, 211 Ill. 310, 71 N. E. 1001; 6 C. J. 77, 78, and cases there cited. This court has, we think, heretofore aligned itself with the rule last above stated. In *Bingham v. Keylor*, 19 Wash. 555, 53 Pac. 729, referring to our attachment act, this court said:

"Under this statute we think an attachment may issue in an equitable action equally as well as in an action strictly legal, when the object is to recover money, and the nature of it is such as to enable the plaintiff to specify the amount of indebtedness; and where the object of the action is to dissolve a partnership and for an accounting, and it is shown that upon such accounting a balance will be due the plaintiff, we perceive no reason why the plaintiff may not have an attachment, provided, of course, he can and does specify in his affidavit the amounts of the indebtedness and some statutory ground for attachment."

In *State ex rel. Getzelman v. Superior Court*, 93 Wash. 98, 159 Pac. 1193, three causes of action were considered, all based upon alleged breaches of the covenants of warranty in a deed, first, for the recovery of damages because of the existence of an easement to carry waste water across the premises; second, for the recovery of damages because third parties were in lawful possession of a portion of the granted premises; and third, for the recovery of damages claimed because of an outstanding lease. There, as here, the defendants in the original action were nonresidents, and a writ of attachment, and afterwards a writ of garnishment, was issued and served

upon a resident garnishee. It was there argued that, because the damages sought were uncertain and unliquidated, they made no basis for the issuance of the writ. And it was there held that damages for the breach of a written contract constitute an indebtedness, within the meaning of the attachment act, and that the nature of that action was such that the plaintiff could and did specify the amount of the money demanded as an indebtedness.

The preference alleged in the original complaint under consideration here is unlawful by reason of the terms of the bankruptcy act (act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. §§ 9585-9656]), and not otherwise; but being unlawful, the taking of the property becomes a conversion; and if an implied promise to pay the value arises in one case, it must also arise in the other. The method of the taking cannot affect the implied promise to pay; nor, if a tort can be waived in one case, is there any reason why it cannot be waived in the other. The true and underlying reason why a writ of attachment or garnishment may not issue in certain cases is because unliquidated damages are sought. But if damages arising from the breach of a written warranty are certain enough, as was held in the *Getzelman* case, then it must surely follow that here, where the value of the property converted is certain, known, and properly alleged, the writ of garnishment lawfully issued.

The superior court has jurisdiction to proceed, and the writ sought will be denied.

CHADWICK, C. J., MAIN, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 15243. Department Two. March 1, 1919.]

THE STATE OF WASHINGTON, *on the Relation of*
Frank Sowders, Plaintiff, v. THE SUPERIOR
COURT FOR PIERCE COUNTY, M. L.
*Clifford, Judge, Respondent.*¹

INFANTS (16) — JUVENILE OFFENDERS — PUNISHMENT — STATUTES. Under the juvenile court law, Rem. Code, § 1987-1 *et seq.*, defining dependent and delinquent children, which provides, in § 1987-11, that no court shall commit a child under sixteen to a jail, common lockup, or police station, and that when sentenced to any institution to which adult convicts are sentenced, it shall be unlawful to confine such child in a building with such adults, and Id., § 1987-12, authorizing a court to turn a child over to the proper authorities for trial when charged with crime, the word "commit" refers only to detentions pending hearing, and a child may be prosecuted for crime and sentenced to the penitentiary, although not confined in a building with adult convicts; and the fact that the state has not made proper provisions, does not prevent such sentence.

PROHIBITION (4)—ADEQUACY OF REMEDY BY APPEAL—INABILITY TO GIVE BAIL. The fact that one convicted of crime cannot give bail is no reason for reviewing errors of the trial court by the extraordinary writ of prohibition.

Application for writ of prohibition, filed in the supreme court February 4, 1919, to prohibit the superior court for Pierce county, Clifford, J., from sentencing a convicted child to the penitentiary. Denied.

M. J. Gordon and *A. O. Burmeister*, for relator.

William D. Askren and *J. W. Selden*, for respondent.

MOUNT, J.—This is an application for a writ of prohibition against the superior court of Pierce county.

It appears from the application that the relator is a child under the age of sixteen years, and that, on the 20th day of November, 1918, he was charged by the prosecuting attorney with the crime of murder in

¹Reported in 179 Pac. 79.

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the first degree. Upon a trial of that charge to a jury on the 8th day of January, 1919, he was convicted of the crime of manslaughter. Thereafter the trial court overruled a motion in arrest of judgment, and declared that it would sentence the relator to imprisonment in the penitentiary for a term of not less than one nor more than fifteen years, but that the sentence would not be pronounced until an opportunity could be given the relator to apply to this court for a writ of prohibition.

The application for the writ is based upon two grounds: First, that the court is without jurisdiction to sentence the relator to the penitentiary; and second, that the crime of manslaughter was not charged in the information and therefore the verdict of the jury was a nullity.

The first contention is based upon the provisions of § 11 of the act of 1913 relating to dependent and delinquent children, known as the juvenile court law, Laws 1913, p. 520, being §§ 1987-1 to 1987-18 of Rem. Code. Section 11 (p. 529), provides:

“No court or magistrate shall commit a child under sixteen years of age to a jail, common lock-up, or police station; but if such child is unable to give bail, it may be committed to the care of the sheriff, police officer, or probation officer, who shall keep such child in some suitable place or house or school of detention provided by the city or county, outside the inclosure of any jail or police station, or in the care of any association willing to receive it and having as one of its objects the care of delinquent, dependent or neglected children. When any child shall be sentenced to confinement in any institution to which adult convicts are sentenced, it shall be unlawful to confine such child in the same building with such adult convicts, or to bring such child into any yard or building in which such adult convicts may be present.” *Id.*, § 1987-11.

It is contended by counsel for the relator that the first part of this section is a prohibition against committing a child under the age of sixteen years to the penitentiary; that the intention of the whole act was to prohibit the punishment of children in penal institutions.

Section 1 of this act provides that a "dependent child" shall mean any child under the age of eighteen years. The act then makes eighteen classifications of dependent children and then it defines a delinquent child as follows:

"The words 'delinquent child' shall include any child under the age of eighteen years who violates any law of this state, or any ordinance of any town, city, county or city and county of this state defining crime; or who habitually uses vile, obscene, vulgar, profane or indecent language, or is guilty of immoral conduct; or who is found in or about railroad yards or tracks; or who jumps on or off trains or cars; or who enters a car or engine, without lawful authority." *Id.*, § 1987-1.

The definitions of a dependent child and a delinquent child are different. A dependent child is not a criminal, while a delinquent child may be one who commits crime. The remaining part of the act up to § 11 provides for juvenile courts, probation officers and expenses thereof, the taking charge of children and the hearings upon such charges, the commitment of children and their adoption. Section 12 provides that, when a child under eighteen years of age is arrested, it may be taken before a justice of the peace or directly before the juvenile court. The section then provides for an examination before such court and that—

"If, upon investigation, it shall appear that a child has been arrested upon the charge of having com-

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mitted a crime, the court, in its discretion, may order such child to be turned over to the proper officers for trial under the provisions of the criminal code." *Id.*, § 1987-12.

From a careful consideration of the whole act, it is apparent that this act intends that children under the age of eighteen years who commit crime may, in the discretion of the juvenile court, be prosecuted under the criminal law for the commission of such crimes. It follows that, if children may be prosecuted, they may be also sentenced under the criminal law. In fact, the latter part of § 11 directly infers that a child may be sentenced to any institution in which adult convicts are sentenced, with the provision that it shall be unlawful to confine such child in the same building with such adults or to bring such child into any yard or building in which such adult convicts may be present. These provisions of this act make it plain that, where a child has committed a crime, he may be prosecuted and sentenced under the criminal code. The first part of § 11, above quoted, at first reading may appear to be in conflict with the last part of that section; but it is apparent, we think, that the word "commit," as used in the first part of the section, refers to a commitment to a jail, common lock-up, or police station for detention during investigation or correction by the juvenile court, and does not refer to a sentence pronounced after a trial under the criminal law, while the last part of the section refers to sentences pronounced under the criminal law as distinguished from commitments to jails, common lock-ups, or police stations for juvenile delinquents whose hearings are had before the juvenile court. It is apparent, therefore, that the superior court, having tried the relator under the criminal law, has power and jurisdiction to commit him to the penitentiary for the crime

for which he was convicted. We might add that in such sentence, the court should provide that the child shall not be confined in a building with adult convicts or permitted in any yard where adult convicts may be present. The trial court having power and jurisdiction to sentence the relator to the penitentiary, it follows that the writ of prohibition may not issue.

It is contended by counsel for the relator that he has no adequate remedy by appeal because he is now confined in jail in Pierce county, and is unable to give bond. If the court is not acting in excess of jurisdiction in pronouncing the sentence, it is plain that the remedy by extraordinary writ cannot be used to review errors which have been committed in the trial. The fact—if it be a fact—that the relator cannot give bail is not a sufficient reason for reviewing errors of the trial court upon extraordinary writs. If the trial court has made errors upon the trial of the case, those errors may be reviewed upon appeal.

Counsel for relator also contend that there is no provision for caring for delinquent children at the state penitentiary. That fact may not be considered by the trial court or by this court. It is the duty of the state to make provision, and if provision has not been made, that fact does not prevent the trial court from pronouncing judgment.

For these reasons, the application for the writ must be denied.

CHADWICK, C. J., FULLERTON, PARKER, and HOLCOMB, JJ., concur.

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[No. 15003. *En Banc*. March 1, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v.
E. M. CADWELL, *Appellant*.¹

LARCENY (24) — EVIDENCE — MATTERS OF DEFENSE — REPARATION. Larceny by obtaining money under false pretenses is not expunged by restoring the money.

SAME. Where the state, in a prosecution for larceny, introduced evidence of promises to make restitution and failure to do so, for the purpose of showing guilty intent, the accused should be allowed to show a tender or any other facts tending to show performance of promises to repay or excusing such performance.

HOLCOMB, J., dissents.

Appeal from a judgment of the superior court for King county, French, J., entered March 13, 1918, upon a trial and conviction of grand larceny. Reversed.

William C. Keith, for appellant.

Alfred H. Lundin and *Theodore H. Patterson*, for respondent.

TOLMAN, J.—On December 26, 1917, the prosecuting attorney of King county filed an amended information, charging appellant with the commission of the crime of grand larceny, the charging part of the information being as follows:

“That, on or about the 27th of October, 1916, appellant feloniously, designedly and fraudulently pretended and represented to Thomas J. Young that the lots located at the northeast corner of the intersection of Ravenna avenue and East 62nd street, in the city of Seattle, to wit: Lots 12 and 13, in block 1, of Wade’s addition, were lots 12 and 13, in block 2, of said addition, and thereby induced the said Thomas J. Young to loan to one Frank Pruher the sum of \$250 on said lots 12 and 13, in block 2, of Wade’s addition.”

¹Reported in 179 Pac. 87.

From a verdict of guilty and a judgment based thereon, this appeal is prosecuted. The error assigned and relied upon is that the trial court erred in sustaining the objection to an offer of proof of a tender to the prosecuting witness of the full amount of the loss occasioned by the transaction.

The acts charged as constituting the offense were committed in October, 1916. The mistake or fraud, whichever it be, was discovered in December following. After first protesting that he had shown the right lots, appellant appears to have admitted that a mistake had been made, and then promised to reimburse the prosecuting witness for all loss occasioned thereby, if given two weeks or a month in which to raise the necessary money. This proposition was satisfactory to the prosecuting witness, and he willingly granted the time asked. The state showed in its case in chief the failure to keep this promise, and followed by showing in detail the efforts of the prosecuting witness to collect the money, in person, through his mother, and through an attorney employed by him for that purpose, running over a number of months and including the making and breaking of a good many similar promises on the part of appellant, drawing out the definite statement a number of times that nothing had been paid, apparently on the theory that these numerous unkept promises tended to show a criminal intent in the original transaction; and perhaps, also, for the purpose of affecting the credibility of the accused as a witness in his own behalf.

The appellant offered testimony tending to show that he made an honest mistake in exhibiting the wrong lots to the prosecuting witness. He admitted that he made the promises to pay, asserted a desire to pay for the purpose of righting an unintentional

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wrong, and offered to prove by the testimony of two witnesses that, some months after the original transaction, but while efforts to collect the money were still in progress, such witnesses, in accordance with his instructions, and on his behalf, went to the attorney for the prosecuting witness and tendered to him a sum of money sufficient to take up the loan, both principal and interest. Upon objection by the state, the offer was refused. It will be observed that the only issue requiring proof on the trial was the intent of appellant, which necessarily included knowledge on his part of the falsity of the representations at the time they were made; and the state argues that restitution, or an offer of restitution, is inadmissible, and does not tend to show a lack of guilty intent.

The pecuniary loss by the prosecuting witness is not a necessary element of the offense, and it has been frequently held that the criminal character of such an act is to be determined by the means used to obtain the money and not by the use made of it afterward. In other words, the crime, if one be committed, is not expunged by restoring the fruits thereof. This position is amply supported by authority. *People v. Lennox*, 106 Mich. 625, 64 N. W. 488; *Carlisle v. State*, 77 Ala. 71; *State v. Loesch* (Mo.), 180 S. W. 875; *People v. Reiss*, 114 App. Div. 431, 99 N. Y. Supp. 1002.

We accept this rule and adhere to it, but we think its application may be waived by the state by its course of conduct. In this case, by first opening wide the gate, entering the field, and laying before the jury, in detail, all of the circumstances surrounding the prosecuting witness' efforts to collect, including the promises and their breach, the jury might have been led to find a guilty intent from the breach of the

promises only, or the evidence of unperformed promises may have so affected appellant's credibility in the eyes of the jury, as to cause a rejection of his testimony *in toto*; and still further, the delay in instituting these proceedings, preceded by the unsuccessful efforts to collect, may have caused the jury to find him guilty of a failure to repay, rather than of the crime with which he is charged.

We think that, logically, as well as in fairness to the accused, the state having introduced evidence of the promises and the failure to perform, the appellant should have been permitted to show a tender, or any other facts tending to show the performance of his promise to repay, or excusing such performance; with leave, of course, to the state on rebuttal, to show that such tender, or other act, was done for the purpose of avoiding prosecution. The general rule is that, where the intent with which an act is done is an essential element, all the attendant circumstances are admissible, and considerable latitude is allowed in the introduction of evidence. Elliott, Evidence, § 2975. The state having availed itself of this rule, and assumed that the making and the breach of the promises tended to show guilty intent, appellant was entitled to negative the state's contentions by showing performance or tender.

Judgment reversed.

CHADWICK, C. J., MOUNT, FULLERTON, and PARKER, JJ., concur.

MITCHELL, J. (concurring)—I concur in the result reached in the majority opinion, on account of the particular defense interposed and because the state introduced evidence to show defendant did not comply with his promise to repay the prosecuting witness. Failure

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of compliance on the part of the defendant with his promise to repay is immaterial in a prosecution for, and not essential to a conviction of, the crime of larceny. On the other hand, a promise to pay by one confronted with the accusation of having obtained money under false pretenses—proof of which is always proper as going to the question of criminal intent—is not of itself sufficient to permit the defendant to introduce in evidence a subsequent self-serving declaration of an offer to restore. Larceny is an offense against the public not to be condoned, or defended against, even by complete restoration to the injured party of the property stolen. Or, as was said by this court in *State v. Craddick*, 61 Wash. 425, 112 Pac. 491:

“A thief will not be accorded immunity by the law by simply returning the stolen property when he finds that his crime has been discovered.”

MACKINTOSH and MAIN, JJ., concur with MITCHELL, J.

HOLCOMB, J. (dissenting)—I dissent. For the reasons very cogently stated in the foregoing special concurrence, the offer was inadmissible, and besides the defendant testified to the same himself. The judgment should be affirmed.

[No. 15089. Department One. March 1, 1919.]

CHARLES FLESSHER, *Respondent*, v. CARSTENS PACKING
COMPANY, *Appellant*.¹

APPEAL AND ERROR (428) — REVIEW — HARMLESS ERROR — PREJUDICIAL EFFECT. It is not prejudicial error for the court to permit the jury to determine an issue, where the court should have made the same findings as a matter of law.

EVIDENCE (31)—BURDEN OF PROOF—PARTY ASSERTING FACT. In a parents' action for damages on account of medical attendance and expenses in caring for a child, the defendant, having asserted that such items had already been litigated, has the burden of proving the fact.

DAMAGES (115)—EXCESSIVENESS—LOSS OF SERVICES. A verdict for \$900, for loss of services of a child during minority is not excessive.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered February 1, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort, after a trial on the merits. Affirmed.

Kerr & McCord, for appellant.

Bryan & Garland (*Marion Garland*, of counsel), for respondent.

MACKINTOSH, J.—The daughter of the respondent, it is alleged, was rendered sick by eating some dried beef purchased from the appellant company, the beef being unfit for food. The respondent asked to recover for medical services, the expense of care and nursing for his daughter, and the loss of her services during the period of her minority. The answer, after denying all the material allegations of the complaint, contained the affirmative allegation that the respondent, as guardian *ad litem* of his daughter, had thereto-

¹Reported in 179 Pac. 100.

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fore commenced an action in the Federal court for the same items of damage, and that a jury had returned a verdict in his favor, and alleged that the respondent, by reason of the former action, was estopped to maintain this one. The reply to this affirmative defense alleged that the damages on account of medical attendance and expense of care and nursing were not involved in the Federal court case, and that that case involved only damages for loss of services. A motion having been made for judgment on the pleadings, judgment was entered dismissing the action, from which an appeal was taken to this court, where the action of the lower court was reversed. *Flesscher v. Carstens Packing Co.*, 96 Wash. 505, 165 Pac. 397.

In the former appeal, the question was determined as to whether "in the action tried in the Federal court there were included the items of medical treatment and care or nursing," and we held that, so far as the pleadings were concerned, "the items of medical attendance and expenses for care and nursing were not included in the allegations of the complaint in the Federal court action and were in no form litigated in that action"; and held that, when a minor is injured, "two causes of action arise, in favor of the minor for pain and suffering and permanent injuries, and the other in favor of the parent for loss of services during minority and expenses of treatment. These actions may be joined or tried separately." And that, where the minor is injured and action is brought by the parent as guardian *ad litem*, and in that action recovery is sought, or there are litigated items of damage which belong to the parent, a subsequent action cannot be waged by the parent for the same items, and the parent is estopped from subsequently recover-

ing therefor; and that the respondent in this action, when he sued as guardian *ad litem* for his minor daughter and included in that action the items of loss of services, it was an item for which he could have recovered in a direct action himself, but that he did not include in the Federal court action the items for expenses for medical attendance, care and nursing, and was not estopped from maintaining the present action.

When the case was remitted to the superior court, it proceeded to trial and the jury returned a verdict in favor of respondent, upon which judgment was entered, and from it this appeal was taken.

The appellant asserts its right to have had a judgment notwithstanding the verdict, claiming that the burden of proof was upon the plaintiff to prove that the damages claimed in this action were not litigated in the action tried in the Federal court, and that it was the duty of the court, rather than the jury, to pass on the sufficiency of the testimony introduced in regard to this question. Assuming that this latter claim is correct, it would avail the appellant nothing; for, under the testimony of the case, the court would have been compelled to have determined, as a matter of law, that the items sought to be recovered in this action were not litigated in the Federal court action, and to have so instructed the jury; and certainly the appellant cannot claim any prejudice from the fact that the court, instead of so instructing the jury, allowed the jury to determine, as a matter of fact, whether the same claims were involved in both actions. If there were an error it was in the appellant's favor.

The contention as to where rested the burden of proof is answerable by a reference to the pleadings;

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the burden remains where it was placed by the pleaders. The appellant, having asserted that the items involved in this action had already been in litigation in the Federal court, had the burden of proving that allegation. The matter set up in reply to the appellant's affirmative defense amounted to no more than a general denial.

Objection is made to the verdict because the appellant is not satisfied that the damages were proved to have followed from the injury. The testimony, however, shows us that it was ample on which the jury could have based its verdict.

It is also claimed that the verdict is so excessive that it shows the result of prejudice and passion, and was assessed upon an erroneous basis. The verdict being for the sum of \$900, it does not appear to us that there is merit in these contentions.

The other claims of error are equally without merit. The judgment is affirmed.

CHADWICK, C. J., TOLMAN, MITCHELL, and MAIN, JJ., concur.

[No. 14620. *En Banc*. January 22, 1919.]

O. C. OLSEN, *Appellant*, v. WILLIAM H. HAGEN *et al.*, as *Executors etc.*, *Respondents*.¹

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 23, 1917, upon findings in favor of the defendants, in an action to enforce a claim against an estate, tried to the court. Reversed.

F. E. Langford and *Luctus G. Nash*, for appellant.

Peacock & Ludden, for respondents.

ON REHEARING.

FULLERTON, J.—Upon rehearing *En Banc* and a careful reconsideration of the whole subject-matter, the majority of the court adheres to and reaffirms the views heretofore expressed in the opinion which will be found in 102 Wash. 321, 172 Pac. 1173.

MAIN, TOLMAN, MOUNT, MITCHELL, and PARKER, JJ., concur.

MACKINTOSH, J. (dissenting)—This action was brought, tried and argued on the pretension that there had been an express contract to pay Hooker for his services, or, at least, an implied agreement which would entitle him to recover on "quantum meruit." We agree with the majority that "there is no proof of an express contract by Mrs. Wharton to pay Hooker for his services, other than her statement to him, at the time of delivering the notes for \$10,000, that it was in accordance with a promise to her husband to compensate him for his past services." Nor is there anything in the evidence showing an implied contract by Mrs. Wharton to remunerate Hooker, upon which an action of "quantum meruit" could be based, and, so agreeing, we think the action should have been dismissed. The majority, however, are allowing a recovery, not on an express or implied contract to pay for services, but on the strength of a promise made by Mrs. Wharton to her husband, sometime before his death, to pay Hooker a specific sum. As we view it, Hooker is not entitled under the law to the receipt of this sum, which the complaint does not even claim for him, and, certainly, under the facts, he merits nothing further than he has already received. The facts do not support the charge of respondent Hooker of \$10,000 as a valid indebtedness of the estate of Mrs. Wharton. It is true that a specific sum of \$10,000 occurs in various transactions between Mrs. Wharton and Hooker; the execution of subsequently revoked wills bequeathing that specific sum, and the delivery by Mrs.

¹Reported in 178 Pac. 451.

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Wharton to Hooker of notes aggregating that amount, though later returned to the maker by Hooker, seem to argue a more or less definite agreement, but this contention is refuted by the actual disposition of the decedent's property as a whole. There can be no question that Mrs. Wharton was more than just in her testamentary treatment of Hooker; she was liberal. It seems quite convincing that, had there been a definite obligation to Hooker in the specific sum of \$10,000, she would have so indicated in a will which actually devised and bequeathed to him property much in excess of that sum. We can attach no weight to the suggestion that Mrs. Wharton and Hooker had a disagreement of so serious a nature before her death as to prompt her to deprive him of what she knew was a valid claim, for such position is inconsistent with the liberal settlements she finally made upon him. Even had a definite promise been made to pay the sum of \$10,000, it has been more than met by payments and bequests in excess of such amount. The case, as far as it presents a question of fact, cannot be reconciled with the conclusion reached by this court, and we are constrained to dissent.

CHADWICK, C. J., and HOLCOMB, J., concur with MACKINTOSH, J.

[No. 14630. *En Banc*. February 8, 1919.]

C. SALVINO, *Plaintiff*, v. TAYLOR MILL COMPANY, *Defendant*.
CEDAR LAKE LOGGING COMPANY, *Appellant*, v. LEE MCKINSTY,
as Receiver, etc., Respondent.¹

Motion to dismiss an appeal from an order of the superior court for King county, Ronald, J., entered September 18, 1917, allowing claims against an insolvent and fixing their priority. Granted.

J. E. Frost and Jones & Riddell, for appellant.

Shorett, McLaren & Shorett and Jno. A. Coleman, for respondent.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein, as reported in 102 Wash. 507, 173 Pac. 433, and for the reasons there stated, the motion for the dismissal of the appeal is granted.

¹Reported in 178 Pac. 453.

[No. 14566. *En Banc*. February 14, 1919.]

PHILIP ZURFLUH, *Appellant*, v. BEET HARTMAN *et al.*, *Respondents*.¹

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered November 7, 1917, upon findings in favor of the defendants, in an action to foreclose a mortgage, tried to the court. Affirmed.

Fred M. Bond, for appellant.

Lockerby & Wright, for respondents.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein, as reported in 103 Wash. 452, 174 Pac. 963, and for the reasons there stated, the judgment is affirmed.

[No. 14750. *En Banc*. February 14, 1919.]

OLIVE COMPANY, *Appellant*, v. S. V. MEEK, *Respondent*, MAIN STREET GARAGE COMPANY, *Defendant*.²

Cross-appeals from a judgment of the superior court for Spokane county, Blake, J., entered December 13, 1917, upon findings in favor of the defendants, dismissing proceedings supplemental to execution, tried to the court. Affirmed.

Allen, Winston & Allen, for appellant.

John M. Gleeson and *A. G. Gray*, for respondent.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein, as reported in 103 Wash. 467, 175 Pac. 33, and for the reasons there stated, the judgment is affirmed.

¹Reported in 178 Pac. 454.

²Reported in 178 Pac. 450.

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- scription, the exclusion of a complaint in a former action by defendant showing he originally claimed a public way is not reversible error, where there was no dispute in the evidence as to that question. *Hendrickson v. Sund*..... 406
28. APPEAL (458) — REVIEW — HARMLESS ERROR — FACTS OTHERWISE ESTABLISHED. Error in the exclusion of evidence as to what a deceased wife had told witness as to the date of her birth is harmless where he testified as to her age from his own knowledge. *Armstrong v. Modern Woodmen of America*..... 356
29. APPEAL (462)—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Error in instructions to the jury is harmless where the verdict was merely advisory. *Owens v. Bausman*..... 412
30. APPEAL (465)—REVIEW—HARMLESS ERROR—INSTRUCTIONS CURED BY VERDICT. An erroneous instruction is harmless if, under the evidence, no other verdict could have been rightfully returned. *Blanchard v. Puget Sound Traction, Light & Power Co*..... 226
31. APPEAL (465)—REVIEW—HARMLESS ERROR—INSTRUCTIONS—CURE BY VERDICT. In an action brought for wrongful death under the Federal liability act, an instruction that contributory negligence would be a defense is harmless error, where there was no evidence of negligence to sustain any verdict for the plaintiff and the jury found for the defendant. *Miller v. Great Northern R. Co*..... 349

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

Affirmance of judgment as precluding debtor from acquiring offset by payment of mortgage on property, see REPLEVIN.

32. APPEAL (493)—DECISION—MODIFICATION—LEAVE TO ATTACK. The rule that the trial court cannot enjoin execution upon a judgment affirmed by the supreme court, will not be enforced, where the supreme court had granted a judgment debtor leave to apply to the trial court for such relief as he may be entitled to; since the rule is one of policy and of doubtful application under the circumstances. *State ex rel. Hartford v. Superior Court*..... 49
33. APPEAL (493, 498)—DECISION—REMAND—MODIFICATION—RECALL OF REMITTITUR—LEAVE TO ATTACK. The supreme court, having affirmed a judgment in replevin for the return of an automobile or for its value, will not recall the remittitur in order to deduct the amount of a mortgage lien, paid off by the judgment debtor subsequent to the judgment; since such payment did not affect the merits, and appeals must be determined on the record made below; but leave will be granted to apply to the trial court for any relief to which he may be entitled, treating the judgment as one of final determination in that court. *Hartford v. Stout*..... 46

Appliances:

Liability of employer for defects, see MASTER AND SERVANT, 7, 9.

Application:

For continuance in criminal prosecutions, see CRIMINAL LAW, 7.

For insurance, see INSURANCE, 5.

Of proceeds on foreclosure sale, see MORTGAGES, 7.

Of payments, see PAYMENT.

Appointment:

Fraud and collusion in appointment of receiver, see RECEIVERS.

Argument of Counsel:

As harmless error, see CRIMINAL LAW, 21.

Assessment:

By bank examiner upon stockholders of insolvent bank, see BANKS AND BANKING.

Of tax, see TAXATION, 7-9.

Assignments:

Of mortgage or debt, see MORTGAGES, 5.

Assumption:

Of facts in charge to jury, see CRIMINAL LAW, 10, 11.

Of risk by employee, see MASTER AND SERVANT, 3, 7.

Of risk by spectator at ball game struck by foul ball, see THEATERS AND SHOWS, 3.

Attachment:

See GARNISHMENT, 1.

Construction of attachment and garnishment acts as *in pari materia*, see STATUTES, 2.

1. ATTACHMENT (33)—DISSOLUTION—GROUNDS—MOTION. A motion to discharge an attachment on the ground that it was "improperly or irregularly issued," as authorized by Rem. Code, § 674, is sufficient where it was supported by affidavits traversing the plaintiff's allegations of attachment. *Fawcner, Currie & Co. v. Sanitary Fish Co.* 88
2. SAME (39-1)—DISSOLUTION—EFFECT OF AFFIDAVITS. It is not error to discharge an attachment where the affidavit therefor traversed every material allegation of the plaintiff tending to support the attachment, without equivocation or evasion. *Fawcner, Currie & Co. v. Sanitary Fish Co.*..... 88

Attorney and Client:

Misconduct of counsel as harmless error, see APPEAL AND ERROR, 25.

Solicitation of legal business for attorneys by commercial corporation, see CORPORATIONS, 4.

Attorney and Client—Continued.

Argument of counsel as harmless error, see **CRIMINAL LAW**, 21.

Attorney's fees on divorce, see **DIVORCE**, 2-4.

Advice of counsel instituting prosecution as constituting probable cause, see **MALICIOUS PROSECUTION**.

Attorney's fees on foreclosure of mortgage, see **MORTGAGES**, 8, 9.

1. **ATTORNEY AND CLIENT (44)—COMPENSATION—PERFORMANCE OF SERVICE—EVIDENCE—SUFFICIENCY.** In an action to recover attorney's fees agreed to be paid in the sum allowed by the court for the foreclosure of mortgages, evidence to the effect that the mortgagee was to be given a little time in case he was compelled to bid in the property, does not warrant denial of recovery for the full amount. *Langford v. Pringle*..... 277

Authority:

Of state bank examiner to make and enforce assessment on stockholders of insolvent bank, see **BANKS AND BANKING**.

Of corporation to issue certificates of preferred rights, see **CORPORATIONS**, 1.

Of agent, see **PRINCIPAL AND AGENT**, 1, 2.

Automobiles:

Injury to traveler on highway, see **HIGHWAYS**.

Collision with in city street, see **MUNICIPAL CORPORATIONS**, 8.

Negligence of driver imputable to passenger, see **NEGLIGENCE**, 2.

Collision with train at crossing, see **RAILROADS**.

Collision with street car at crossing, see **STREET RAILROADS**.

Badge:

Of fraud, see **FRAUDULENT CONVEYANCES**, 1.

Bail:

Inability to give bail as reason for review by prohibition, see **PROHIBITION**.

Bailment:

1. **BAILMENT (3, 8)—ACTIONS—DAMAGES—DEFENSES.** Under a lease of a donkey engine requiring the lessees to accept it in its present condition and return it in as good condition, plus any betterments that might be placed upon it, it is inadmissible, in defense of an action for rent and damages, to show the lessees' cost of repairs and betterments, and that they discarded it because too expensive to keep up. *Bratt v. Poole*..... 565

Bankruptcy:

Garnishment in action to set aside preference under bankruptcy act, see **GARNISHMENT**, 2.

Banks and Banking:

Holder in due course of check received as conditional deposit, see **BILLS AND NOTES**, 2.

1. **BANKS AND BANKING (3)—STOCKHOLDER'S LIABILITY—ASSESSMENT OF STOCK—POWER OF EXAMINER.** Under Rem. Code, § 3327, of the banking act, which provides that the state bank examiner may if necessary to pay debts, enforce the individual liability of stockholders, the bank examiner has authority to determine the necessity and amount of an assessment upon stockholders of an insolvent bank without resorting to a judicial inquiry. *Hanson v. Soderberg* 255
2. **SAME.** The same would be true of the act of 1917, p. 290, § 35, which gives the state bank examiner power to enforce the stockholder's liability as soon after taking possession as in his judgment may be necessary and making the failure of the stockholders to make good any impairment of the assets conclusive evidence that the double liability is necessary. *Hanson v. Soderberg*..... 255
3. **SAME.** Laws of 1917, p. 290, § 35, relating to the authority to enforce the statutory liability of bank stockholders bears upon the remedy only, and is accordingly applicable to an assessment upon a bank in liquidation under the act of 1915. *Hanson v. Soderberg* 255
4. **SAME (3)—CONSTITUTIONAL LAW (42)—EXECUTIVE POWERS—ENCROACHMENT ON JUDICIARY—BANK EXAMINER.** Conferring authority upon the state bank examiner to make and enforce an assessment upon the stockholders of an insolvent bank is not objectionable as conferring judicial power upon a ministerial officer. *Hanson v. Soderberg* 255

Bar:

Of action by former adjudication, see **JUDGMENT**.

Baseball Games:

Injury to spectator struck by foul ball, see **THEATERS AND SHOWS**.

Bequests:

In general, see **WILLS**.

Bills and Notes:

Failure of consideration for notes, see **CONTRACTS**, 2.

1. **BILLS AND NOTES (7)—CONSIDERATION.** The amount which attorneys in a foreclosure action were entitled to as a reasonable fee under the terms of the mortgage note, agreed to upon settlement of such action, is a good and valuable consideration for a note therefor by the mortgagors to the attorneys. *Owens v. Bausman*..... 412
2. **BILLS AND NOTES (66, 68)—CHECKS—"HOLDER IN DUE COURSE"—CONDITIONAL DEPOSIT.** A bank which received a check for collection

Bills and Notes—Continued.

on a conditional credit, and honored the depositor's checks exhausting his balance, including the deposited check, thereby becomes a holder in due course, under Rem. Code, §§ 3417 and 3418, providing that a holder is deemed a holder for value where value has at any time been given for the instrument, or, if he has a lien thereon, by contract or implication of law, to the extent of such lien. *Old National Bank of Spokane v. Gibson*..... 578

Bona Fide Holder:

As against prior mortgage, see MORTGAGES, 2.

Bona Fide Purchaser:

Of lands, see VENDOR AND PURCHASER, 2-4.

Bonds:

Contractors' bonds, see COUNTIES; MUNICIPAL CORPORATIONS, 5-7.

Sureties on bonds, see PRINCIPAL AND SURETY.

Construction of act giving right of action on contractor's bond, see STATUTES, 1.

Breach:

Of contract, in general, see CONTRACTS.

Of policy by insured, see INSURANCE, 3, 4.

Of contract of sale, see SALES.

Brokers:

Insurance broker, see INSURANCE, 1.

Building Contracts:

See CONTRACTS, 3, 4.

Parol evidence to explain, see EVIDENCE, 12.

Burden of Proof:

In civil actions, see EVIDENCE, 2, 3.

To show fraud in conveyance of property, see FRAUDULENT CONVEYANCES, 4.

To show notice of prior mortgage, see MORTGAGES, 4.

To overcome tax deed, see TAXATION, 12.

Cancellation of Instruments:

Rescission of sale of stock for fraud, see CORPORATIONS, 3.

Setting aside fraudulent conveyances, see FRAUDULENT CONVEYANCES.

Tax deeds, see TAXATION, 11, 12.

Rescission of contract of sale of land, see VENDOR AND PURCHASER, 1.

1. CANCELLATION OF INSTRUMENTS (2)—FAILURE OF CONSIDERATION.
A conveyance by an aged couple to a daughter in consideration of life support, fully performed on the part of the daughter, should not be cancelled for dissatisfaction on the part of one of the grantors because the daughter, through a mistake, instituted in-

Cancellation of Instruments—Continued.

sanity charges against her mother; especially where such act was not wilfully and purposely wrong, and extensive improvements had been made on the property for the convenience of the grantors. *Miller v. Goltz*..... 28

Carriers:

Master's liability for injuries to servant, see MASTER AND SERVANT, 3-9
Negligence of driver of auto stage imputed to occupant, see NEGLIGENCE, 2.

1. CARRIERS (108)—PASSENGERS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for personal injuries sustained by one injured while attempting to board a street car, it is not error to refuse a requested instruction to the effect that plaintiff could not recover if he was injured by attempting to board a moving car, and if such attempt was the proximate cause of the injury or contributed thereto, where other instructions clearly stated that the jury must find that the car had stopped when plaintiff attempted to board it, that being the only issue in the case. *Calhoun v. Portland, Railway, Light & Power Co.*..... 592

Cause of Action:

Appealability of order requiring election between causes of action, see APPEAL AND ERROR, 2.
Election between, see EASEMENTS, 3.

Census:

Conclusiveness of decision of county board as to number of inhabitants in boundaries of proposed town, see MUNICIPAL CORPORATIONS, 3.

Certificate:

Of preferred rights, authority to issue, see CORPORATIONS, 1.

Certiorari:

1. CERTIORARI (5)—WHEN LIES—APPEAL. Certiorari does not lie to review an order dissolving a temporary injunction, in the absence of a finding of insolvency, since in such case the order is not appealable. *State ex rel. Hillman v. Superior Court*..... 324

Change of Parties:

As discharging surety, see PRINCIPAL AND SURETY, 2, 3.

Character:

Examination of character witness, see WITNESSES, 6.

Charge:

To jury in criminal prosecutions, see CRIMINAL LAW, 10-14, 19.
To jury in civil actions, see TRIAL, 6.

Chattel Mortgages:

Breach of provision against in policy, see **INSURANCE**, 4.

Checks:

Holder of in due course, see **BILLS AND NOTES**, 2.

Child:

Adoption of, see **ADOPTION**.

Damages for loss of services of, see **DAMAGES**, 3.

Division of property for support of, see **DIVORCE**, 9.

Prosecution and punishment of juvenile offenders, see **INFANTS**.

Church:

See **RELIGIOUS SOCIETIES**.

Citation:

To bring in new parties, see **PARTIES**, 2.

Cities:

See **MUNICIPAL CORPORATIONS**.

Claim and Delivery:

See **REPLEVIN**.

Claims:

Amount of claim against indemnity bond as determining jurisdiction on appeal, see **APPEAL AND ERROR**, 1.

Against estate of decedent, see **EXECUTORS AND ADMINISTRATORS**, 3, 4.

Mining claims, see **MINES AND MINERALS**.

Objections to failure to present claim against estate, see **PLEADING**.

Coal Lands:

Taxation of, see **TAXATION**, 7-9.

Collision:

Between auto and bicycle in city street, see **MUNICIPAL CORPORATIONS**, 8.

Negligence of driver of vehicle imputed to occupant, see **NEGLIGENCE**, 2.

Injuries to traveler at railway crossing, see **RAILROADS**.

Collusion:

In appointment of receiver, see **RECEIVERS**.

Comment:

By judge at criminal trial, see **CRIMINAL LAW**, 10, 11.

Commerce:

Applicability of employers' liability act to railroad employees, see **MASTER AND SERVANT**, 3, 4.

Commissioners:

Contest of election of for diking district, see ELECTIONS.

Determining population of proposed town, see MUNICIPAL CORPORATIONS, 3.

Community Property:

Mutual deeds of to be delivered on death of either party, see DEEDS, 2.

In general, see HUSBAND AND WIFE, 1, 5, 6.

Compensation:

Of attorney, see ATTORNEY AND CLIENT.

Pecuniary compensation for injuries caused by unlawful acts of another, see DAMAGES.

For services, see MASTER AND SERVANT, 1.

Competency:

Of experts as witnesses, see EVIDENCE, 13, 14.

Of witnesses in general, see WITNESSES, 1, 2.

Complaint:

Objections to at trial, see PLEADING.

Compromise and Settlement:

Rights of attorneys on voluntary settlement of divorce suit, see DIVORCE, 2.

Attorney's fees on settlement of foreclosure, see MORTGAGES, 8.

Conclusion:

Of witness, see EVIDENCE, 13, 14.

Conclusiveness:

Of admissions in civil action, see EVIDENCE, 7.

Of order settling final account of executors, see EXECUTORS AND ADMINISTRATORS, 7.

Of judgments, see JUDGMENT.

Of decision of county board as to number of inhabitants within boundaries of proposed town, see MUNICIPAL CORPORATIONS, 3.

Conditions:

As affecting tender, see TENDER, 2.

Condonation:

See DIVORCE, 1.

Conduct:

Of counsel as harmless error, see APPEAL AND ERROR, 25.

Confirmation:

Of oral agreement to convey easement by cotenant, see **TENANCY IN COMMON**, 2.

Consideration:

Of bill of exchange or promissory note, see **BILLS AND NOTES**, 1.

Failure of as ground for cancellation, see **CANCELLATION OF INSTRUMENTS**.

Of contract in general, see **CONTRACTS**, 2.

Of fraudulent conveyance, see **FRAUDULENT CONVEYANCES**, 5.

Evidence to show valuable consideration for mortgages, see **MORTGAGES**, 3.

Constitutional Law:

Authorizing bank examiner to make and enforce assessment on stockholders as conferring judicial powers, see **BANKS AND BANKING**, 4.

Equality and uniformity in taxation, see **TAXATION**, 3.

Construction:

Of contracts, see **CONTRACTS**, 2, 3.

Of contract with promoters of corporation, see **CORPORATIONS**, 5-7.

Grant of easement in deed, see **EASEMENTS**, 2.

Of contract of guaranty, see **GUARANTY**, 1.

Of policy of marine insurance, see **INSURANCE**, 2.

Of statutes, see **STATUTES**.

Of wills, see **WILLS**.

Constructive Trusts:

See **TRUSTS**, 2.

Contempt:

1. **CONTEMPT (7)—ACTS CONSTITUTING—VOID ORDER.** Disobedience of an order entered without jurisdiction of the subject-matter is not contempt. *State ex rel. Hillman v. Gordon*..... 326

Contest:

Of election, see **ELECTIONS**.

Continuance:

In criminal prosecutions, see **CRIMINAL LAW**, 5-7.

Contractors:

On public work, see **COUNTIES**.

Bonds of on public work, see **MUNICIPAL CORPORATIONS**, 5-7.

Contracts:

Agreement for adoption, see **ADOPTION**.

Bailment, see **BAILMENT**.

Contracts—Continued.

For life support, see CANCELLATION OF INSTRUMENTS.
 Of stockholders with creditor of company, see CORPORATIONS, 2.
 Rescission for fraud in sale of corporate stock, see CORPORATIONS, 3.
 With promoters of corporation, see CORPORATIONS, 5-7.
 For county highway work, see COUNTIES.
 Presumptions as to capacity to contract, see EVIDENCE, 1.
 Admission of parol or extrinsic evidence, see EVIDENCE, 9-12.
 Agreements within statute of frauds, see FRAUDS, STATUTE OF.
 Of guaranty, see GUARANTY.
 Of husband or wife, see HUSBAND AND WIFE.
 Of insurance in general, see INSURANCE.
 Leases, see LANDLORD AND TENANT.
 Employment, see MASTER AND SERVANT, 1.
 By agent, see PRINCIPAL AND AGENT.
 Contracts of suretyship, see PRINCIPAL AND SURETY.
 Sales of personalty, see SALES.
 Specific performance, see SPECIFIC PERFORMANCE.
 Sale of land, see VENDOR AND PURCHASER.
 Implied obligations to pay for services rendered, see WORK AND LABOR.

1. CONTRACTS (3)—LOCUS. Preliminary negotiations in this state leading up to a written contract formally entered into in the state of California, are insufficient to establish the locus of the contract in this state. *Gerrick & Gerrick Co. v. Llewellyn Iron Works*..... 98
2. CONTRACTS (33, 72) — SEVERABLE CONTRACTS — REQUISITES — CONSTRUCTION—FAILURE OF CONSIDERATION. A contract by a manufacturer to furnish articles for prizes and the services of a skilled organizer for a trade extension campaign, and the merchant's promissory notes given in consideration thereof, constitute one indivisible contract, and there can be no recovery on the notes in case of failure to furnish the articles or services constituting the consideration. *Loveland v. Reese Co*..... 204
3. CONTRACTS (87) — CONSTRUCTION — SUBJECT-MATTER — PLANS FOR BUILDING—GUARANTY OF SUFFICIENCY. In an action to recover damages from the collapse of a building constructed for plaintiff by defendant, it is error to permit the defendant to introduce evidence of the inadequacy of the plans, where the defendant had contracted to furnish the plans and thereby vouched for their adequacy. *McCConnell v. Gordon Construction Co*..... 659
4. CONTRACTS (164, 176)—DEFENSES—ISSUES AND VARIANCE. In an action to recover damages for the collapse of a building constructed for plaintiff by defendant, the defenses of inadequacy of the plans and that the building collapsed by reason of additional weight imposed by plaintiff's change of the plans, are of the same nature, and if only one of them was raised by affirmative defense, the defend-

Contracts—Continued.

ant should not be heard to say that the other was raised and could be presented under the general denial, where the case had been at issue for months while plaintiff's evidence was being taken by deposition, and nothing in the pleadings or at the trial specially suggested any such defense until the opportunity to guard against it had virtually passed. *McConnell v. Gordon Construction Co.*... 659

Contributory Negligence:

Instructions as to in action for injury to passenger, see **CARRIERS**.
 Of traveler in auto stage, see **HIGHWAYS**, 3.
 Of brakeman killed by train, see **MASTER AND SERVANT**, 6.
 Of rider of bicycle in colliding with auto, see **MUNICIPAL CORPORATIONS**, 8.
 Of driver of auto at railway crossing, see **RAILROADS**, 2-6.
 Of auto driver struck by cable car at crossing, see **STREET RAILROADS**.
 Of spectator at ball game struck by foul ball, see **THEATERS AND SHOWS**, 2, 3.

Conveyances:

See **EASEMENTS**.
 In general, see **DEEDS**.
 In fraud of creditors, see **FRAUDULENT CONVEYANCES**.
 By husband or wife, see **HUSBAND AND WIFE**, 5.
 As security for debt, see **MORTGAGES**.

Corporations:

See **MUNICIPAL CORPORATIONS**.
 Stockholders' guaranty of corporate debt, see **GUARANTY**.
 Enjoining control of by rival factions, see **RELIGIOUS SOCIETIES**.

1. **CORPORATIONS (31, 189)—PREFERRED RIGHTS—AUTHORITY TO ISSUE—ULTRA VIRES.** The issuance of certificates of "preferred rights," under the corporation's general power to borrow money and incur indebtedness, is not *ultra vires*. *Biel v. Union Fuel & Ice Co.*... 41
2. **CORPORATIONS (55)—STOCK—TRANSFER—CONTRACT—PREFERENCES.** A creditor, accepting preferred stock upon a stockholders' guaranty of the company debt, takes the same with all the privileges accorded by the by-laws providing for the retirement of preferred stock by payment of the purchase price with the privilege of receiving common stock, and his relation as a preferred stockholder would not be severed by a tender of the amount of the debt after he had closed the account. *Leezer v. Fluhart*..... 618
3. **CORPORATIONS (56)—PREFERRED RIGHTS—TRANSFER—RESCISSION FOR FRAUD.** A purchaser of "preferred rights" in a corporation affirms the sale, and cannot thereafter rescind, where, a year later, with knowledge of the alleged fraud, he accepted interest due under his contract. *Biel v. Union Fuel & Ice Co.*..... 41

Corporations—Continued.

4. CORPORATIONS (141)—POWERS—LEGALITY OF BUSINESS—PRACTICE OF LAW. A "Merchants Protective Corporation" ostensibly organized to "collect accounts" due its members, but whose sole operation is to solicit legal business for attorneys through the issuance of membership cards which directly challenge its articles and engage, in consideration of a fee, to attend to certain legal business of its members free of charge, is engaged in the practice of law, which is not open to a commercial corporation, and has no right to do business in this state or legal excuse for existence. *State ex rel. Lundin v. Merchants Protective Corporation*..... 12
5. CORPORATIONS (174)—CONTRACT WITH PROMOTERS—CONSTRUCTION—ADOPTION. Under a contract for the conveyance of land to promoters of a corporation, which provided that \$5,000 be paid by the issuance of stock, and that other stock issued to the promoters was to be placed in escrow as security for the balance due which was to be paid by the company, and that, if the balance was not paid when due, such stock was to be turned over to the vendors, it was the intention, on default, that the stock in escrow be delivered in payment for the land; hence a delivery according to the contract could not have been as security but was in payment of the contract, as adopted by the company. *Wilson v. Mears*..... 296
6. SAME. In such case, where the company when organized adopted the promoters' contract, but failed, as it agreed to do, to pay the balance of the purchase price, which was paid by the delivery of the promoters' stock to the vendors, the promoters are entitled to be subrogated to the rights of the vendors against the company, had the vendors elected to waive the security and proceed against the company for the unpaid purchase price. *Wilson v. Mears*..... 296
7. SAME. A promoter, who was manager and a heavy stockholder in a company organized to purchase and work a mining prospect, is not, on default of the company in payment of the price, liable therefor, on the theory that the company having ability to pay, failed to do so, where the evidence failed to show that the company's stock had a market value, it had agreed not to sell its treasury stock, and its property had no real value except as a prospect; since in the absence of proof, it must be assumed that it defaulted in its obligations on account of lack of ability to pay them. *Wilson v. Mears* 296
8. CORPORATIONS (196)—CIVIL ACTIONS—PROCESS—AGENTS. Upon conflicting affidavits upon an issue as to whether one B. was an agent of the defendant corporation upon whom service could be made, the court need not believe the positive denial of B., but is warranted in finding him such agent from the showing that his name appeared as such in the city directory and was so listed with the custom house. *Gordon v. Hillman*..... 529

Corporations—Continued.

9. **CORPORATIONS (263) — FOREIGN CORPORATIONS — PROCESS — DOING BUSINESS IN THIS STATE—AGENT.** The liability to personal service of a foreign corporation doing business in this state rests entirely upon statute; and where, under Rem. Code, §§ 3720-3722, a corporation had authority to do business and such authority had been formally revoked and forfeited for failure to pay its annual license fees, personal service cannot be made upon its former statutory agent, in an action which accrued subsequent to the forfeiture; and it is immaterial that his designation as agent had not been formally revoked. *Gerrick & Gerrick Co. v. Llewellyn Iron Works*..... 98
10. **SAME (263).** Rem. Code, § 3722, making a foreign corporation, once authorized to do business in this state subject to service in actions arising upon its contracts after revocation of its authority and its corporate entity had ceased in this state, does not apply to a cause of action accruing upon a foreign contract after its withdrawal from this state. *Gerrick & Gerrick Co. v. Llewellyn Iron Works* 98
11. **CORPORATIONS (263) — FOREIGN CORPORATIONS — PROCESS — DOING BUSINESS IN STATE—EVIDENCE—SUFFICIENCY.** A foreign manufacturing company is doing business in this state, within Rem. Code, § 226, subd. 9, relating to the service of process, where it had on hand in a warehouse a large list of extras and repair parts of machines sold, to be sold and accounted for as its property by the warehouse company. *Grams v. Idaho National Harvester Company, Limited* 602
12. **SAME (263) — FOREIGN CORPORATIONS — PROCESS — SERVICE ON "AGENT."** An employee of a foreign manufacturing company is an "agent" for the service of process, where he was employed to do whatever was directed by the general manager and was sent to A. county in this state to check up and take possession of the company's stock of goods. *Grams v. Idaho National Harvester Company, Limited* 602

Corroboration:

- Of witness as to falsity of testimony, see **PERJURY**, 4.
 Of witness in general, see **WITNESSES**, 7.

Costs:

- In divorce, see **DIVORCE**, 2-4.
 Attorney's fees in foreclosure suits, see **MORTGAGES**, 8, 9.
1. **COSTS (62)—APPEAL—MORE FAVORABLE JUDGMENT.** A party securing a more favorable judgment on appeal is entitled to costs of the appeal. *Watson v. Barnard*..... 536

Counties:

- Liability for defects in highway, see **HIGHWAYS**.
1. **COUNTIES (46)—HIGHWAYS (33)—CONTRACTS—CONTRACTOR'S BONDS —NOTICE—WAIVER.** Where a subcontract on county highway work

Counties—Continued.

was not consented to and filed with the county commissioners as required by the principal contract, the subcontractor was merely the agent of the principal contractor for the purchase of supplies, and not a subcontractor within the meaning of Rem. Code, § 1159-1, requiring notice to the original contractor within ten days of furnishing of supplies to a subcontractor; failure to file the subcontract being a waiver by the original contractor of the right to such notice. *Cascade Construction Co. v. Snohomish County*..... 484

County Board:

Conclusiveness of decision as to population of proposed town, see MUNICIPAL CORPORATIONS, 3.

County Roads:

See HIGHWAYS.

Courts:

Review of decisions, see APPEAL AND ERROR.

Contempt of court, see CONTEMPT.

Suits for divorce, see DIVORCE.

Election contests, see ELECTIONS.

Proceedings in probate, see EXECUTORS AND ADMINISTRATORS.

Conclusiveness of judgments, see JUDGMENT.

Jurisdiction of supreme court to issue mandamus, see MANDAMUS, 2.

Allowance of attorney's fees on foreclosure, see MORTGAGES, 8, 9.

Review of errors by prohibition, see PROHIBITION.

Payment of money into court as tender, see TENDER, 1.

Province of court and jury, see TRIAL, 5.

Examination of witness by court, see WITNESSES, 4.

Credibility:

Of witness as question for jury, see CRIMINAL LAW, 9.

Of prosecutrix, see RAPE.

Creditors:

See FRAUDULENT CONVEYANCES.

Criminal Law:

See HOMICIDE; LARCENY; PERJURY; RAPE.

Violation of fish laws, see FISH.

Offenses by infants, see INFANTS.

Malicious prosecution, see MALICIOUS PROSECUTION.

Review of errors of trial court by prohibition, see PROHIBITION.

Examination of witness at criminal trial, see WITNESSES.

1. CRIMINAL LAW (17, 19)—ACCOMPLICES. As an accessory is tried as a principal, he cannot object to instructions concerning accomplices because he did not do the actual stealing. *State v. Vane*.. 421

Criminal Law—Continued.

2. SAME (27)—JURISDICTION—LOCALITY OF OFFENSE—ACCESSORY IN ANOTHER STATE. Under Rem. Code, § 2254, subdiv. 3, providing for the punishment of one who, being out of the state, counsels, procures or abets another to commit a crime in this state, evidence is admissible of a conversation had with accused in another state, after full agreement and plans for the theft had been made in this state. *State v. Vane*..... 421
3. CRIMINAL LAW (101)—EVIDENCE—RES GESTAE—SUBSEQUENT CONDUCT. Upon a prosecution for larceny by an accessory, evidence that defendant had aided the principal in his defense of alibi on prosecution for the same larceny is admissible as part of the *res gestae*. *State v. Vane*..... 421
4. CRIMINAL LAW (161)—EVIDENCE—TESTIMONY OF ACCOMPLICES. In a prosecution for larceny, evidence is competent against an accessory that the principal, who admitted his guilt, drove the team to H. and there sold them, when such evidence would have been competent against the principal. *State v. Vane*..... 421
5. CRIMINAL LAW — CONTINUANCE — CONVICTION OF PERJURY — EFFECT. The continuance of a criminal case against one convicted of perjury until he had obtained a reversal thereof is properly denied; since Rem. Code, § 1212, providing that any person convicted of perjury shall not be a competent witness unless the judgment is reversed, does not deny the right under Const., art. 1, § 22, to testify in one's own behalf. *State v. Vane*..... 421
6. CRIMINAL LAW (193)—CONTINUANCE—ABSENCE OF WITNESS. It is not error to refuse a continuance because of the absence of a witness wanted for the purpose of impeaching a prospective witness for the state who was not called to testify. *State v. Grant*..... 189
7. CRIMINAL LAW (193)—CONTINUANCE—APPLICATION. A continuance of a criminal case to secure the testimony of a nonresident witness is properly refused where it was not shown that it could be obtained in a reasonable time. *State v. Argentieri*..... 7
8. SAME (236-2)—OPENING STATEMENT—IRRELEVANT TESTIMONY. It is not error to exclude the opening statement of counsel and evidence offered as to the impeachment of a prospective witness for the state who was not called to testify, as the evidence became irrelevant. *State v. Grant*..... 189
9. CRIMINAL LAW (250)—CREDIBILITY OF WITNESS—QUESTION FOR JURY. The credibility of the witnesses is for the jury. *State v. Miller* 475
10. CRIMINAL LAW (255)—INSTRUCTIONS—COMMENTS ON FACTS—CREDIBILITY OF WITNESSES. It is unlawful comment upon the evidence in an action for violation of the state-wide prohibition law, for the court to instruct the jury that the act provides for the activity of

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- citizens other than officers and that it is the duty of any citizen to detect crime, where the only evidence to sustain conviction was that of two detectives who had by deceit and subterfuge induced defendant to violate the law, and the court's purpose clearly was to bolster up the state's witnesses. *State v. Stiebenbaum*..... 157
11. CRIMINAL LAW (255, 259)—TRIAL—INSTRUCTIONS—UNLAWFUL COMMENT—ASSUMPTION OF FACTS. In a prosecution for assault, an admission by the defendant, that when attacked and struck he threw up his arm to ward off a blow, and thought it struck the arm of the assailant, is not an admission that he used force, and does not, even with the testimony of other witnesses, warrant instructions to the jury assuming that he used force, and the same is unlawful comment on the evidence. *State v. Warwick*..... 634
 12. CRIMINAL LAW (301)—INSTRUCTIONS—FORM AND LANGUAGE. Under an information charging the fact of aiding, assisting, etc., in a larceny, employing the words in the conjunctive, it is not error for the instructions to mention them in the disjunctive. *State v. Vane* 421
 13. CRIMINAL LAW (313)—TRIAL—INSTRUCTIONS. Error in an instruction will not be considered on appeal, where appellant fails to indicate wherein it is faulty and did not propose a better one. *State v. Grant* 189
 14. SAME (316)—TRIAL—INSTRUCTIONS ALREADY GIVEN. It is not error to refuse requested instructions that are covered in the general charge. *State v. Vane*.....170, 421
 15. CRIMINAL LAW (356)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DELAY. It is not error to deny a new trial to secure the evidence of a nonresident witness whose address was known before the trial, where no showing was made that he would testify if a new trial were granted. *State v. Argentieri*..... 7
 16. SAME (363)—NEW TRIAL (49)—AFFIDAVITS OF JURORS—IMPEACHMENT OF VERDICT. A verdict of conviction of a druggist of illegally selling intoxicating liquor cannot be impeached by affidavits of the jurors that they considered, and that the verdict was based upon, the druggist's entire register, only one page of which was material under the court's instructions. *State v. Lyle*..... 435
 17. CRIMINAL LAW (385)—APPEAL—OBJECTIONS TO INFORMATION. Matters going to the definiteness or certainty of a charge which might have been cured by amendment cannot be raised for the first time on appeal. *State v. Vane*..... 170
 18. CRIMINAL LAW (387)—APPEAL—OBJECTIONS—To EVIDENCE. In a prosecution of a druggist for an illegal sale of intoxicating liquor, error cannot be predicated upon the admission of the defendant's

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- register showing a thousand other sales within the preceding six months, where the defendant did not request that the page showing the sale in question be detached and the balance of the book excluded. *State v. Lyle*..... 435
19. SAME (391-1)—APPEAL—EXCEPTIONS—NECESSITY—RULINGS ON EVIDENCE. Where instructions invade a constitutional right by unlawful comment on the evidence, it is not necessary that an exception be taken and called to the attention of the trial court. *State v. Warwick* 634
20. CRIMINAL LAW (434)—APPEAL—REVIEW—DISCRETION—CHANGE OF VENUE. The denial of a motion for change of venue on the ground of local prejudice will not be disturbed in the absence of an abuse of discretion, notwithstanding the accused was compelled to go to trial with two jurors who had made affidavits in resistance of the motion for change of venue. *State v. Vane*..... 170
21. SAME (451)—REVIEW—HARMLESS ERROR—ARGUMENT OF COUNSEL. In a prosecution of a druggist for an illegal sale of intoxicating liquors, misconduct of the prosecuting attorney in directing the jury's attention to the pages of the druggist's register showing other sales is cured by an instruction that the register could be considered only as it relates to the sale in question, and to disregard the statements of counsel. *State v. Lyle*..... 435

Cross-Examination:

See WITNESSES, 5.

Crossings:

Accidents at railroad crossings, see RAILROADS.

Accident at street railroad crossings, see STREET RAILROADS.

Cumulative Evidence:

Reception at trial, see TRIAL, 2.

Damages:

Interest in action for damages, see INTEREST.

Measure of damages for malpractice by dentist, see PHYSICIANS AND SURGEONS, 3.

Counterclaim for, in action for price of goods, see SALES, 4.

For failure to deliver goods sold, see SALES, 5.

1. DAMAGES (62)—MEASURE OF DAMAGES—PERSONAL PROPERTY. The measure of damages for injury to an automobile is the difference between its market value just before the injury and immediately thereafter, and not the cost of repairs making it as good as new with respect to appearance and service. *Alexander v. Barnes Amusement Co.* 346
2. DAMAGES (93)—EXCESSIVE DAMAGES—INJURY TO PERSONAL PROPERTY. Evidence of a witness that an automobile had a market value

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of not over \$2,500, and after the accident would sell for \$1,750 to \$2,000, warrants a judgment for damages for no more than \$500.
Alexander v. Barnes Amusement Co...... 346

3. DAMAGES (115)—EXCESSIVENESS—LOSS OF SERVICES. A verdict for \$900, for loss of services of a child during minority is not excessive.
Flessner v. Carstens Packing Co...... 694

Death:

Deposit of deed for delivery on death of party, see DEEDS.
 Wrongful death of employee, see MASTER AND SERVANT, 5, 6, 8, 11.

Debt:

Existence of as ground for garnishment, see GARNISHMENT, 1.
 Stockholders' guaranty of corporate debt, see GUARANTY.
 Community or separate nature of debt, see HUSBAND AND WIFE, 1, 6.
 Conveyances as security for, see MORTGAGES.
 Construction of will as to property charged with payment of, see WILLS, 2.

Debtor and Creditor:

See FRAUDULENT CONVEYANCES.
 Rights of creditor on accepting preferred stock upon guaranty of company debt, see CORPORATIONS, 2.
 Evidence as to direction by debtor as to application of payments, see PAYMENT.

Decedents:

Declarations by person since deceased, see EVIDENCE, 8.
 Estates, see EXECUTORS AND ADMINISTRATORS.

Deceit:

See FRAUD.

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On appeal, see APPEAL AND ERROR, 32, 33.
 Of county board as to population of proposed town, conclusiveness, see MUNICIPAL CORPORATIONS, 3, 4.
 On appeal in replevin, effect, see REPLEVIN.

Declarations:

As evidence in civil actions, see EVIDENCE, 4-6, 8.

Deeds:

Cancellation, see CANCELLATION OF INSTRUMENTS.
 Grant of easement, see EASEMENTS, 2.
 In fraud of creditors, see FRAUDULENT CONVEYANCES, 1, 5.
 Mutual deeds of community property, see HUSBAND AND WIFE, 5.
 Merger of titles by quitclaim deed, see MORTGAGES, 5.

Deeds—Continued.

Tax deeds, see **TAXATION**, 11, 12.

As notice to purchaser, see **VENDOR AND PURCHASER**, 2-4.

1. **DEEDS (17)—DELIVERY—ESCROW—CONTROL.** Sufficient delivery of a deed is not shown by placing it in escrow with a third party, if it was still in the control of the grantor and there was no present intention to part with title. *Bloor v. Bloor*..... 110
2. **SAME (17-1)—DEPOSIT FOR DELIVERY ON DEATH—MUTUAL DEEDS.** Since simultaneous deeds of community property by husband and wife to each other, placed in escrow to be delivered to the survivor on the death of either, take effect presently, if at all, and since they negative one another, there can be no effective delivery. *Bloor v. Bloor* 110

Defect:

In highway, see **HIGHWAYS**.

Injury to servant from defective handcar, see **MASTER AND SERVANT**, 9.

In goods as defense in action for price, see **SALES**, 4.

Deficiency:

Amendment of sheriff's return to show, on foreclosure of mortgage, see **MORTGAGES**, 6.

Delinquent Child:

Prosecution and punishment of, see **INFANTS**.

Delivery:

Of deed, see **DEEDS**.

Of goods sold, see **SALES**, 1-3, 5.

Demand:

Interest on demands not liquidated, see **INTEREST**.

Dentists:

Malpractice, see **PHYSICIANS AND SURGEONS**.

Deposits:

Of checks in bank, see **BILLS AND NOTES**, 2.

Of deeds in escrow for delivery on death of party, see **DEEDS**.

Deposit of money with third party as tender, see **TENDER**, 1.

Deposits in Court:

Necessity of bringing money into court, see **TENDER**, 1.

Devises:

See **WILLS**.

Specific performance of contract to devise, see **SPECIFIC PERFORMANCE**, 3.

Dikes:

Contest of election for officers of diking district, see ELECTIONS.

Diligence:

Affecting right to new trial, see CRIMINAL LAW, 15.

Discharge:

Of attachment, see ATTACHMENT.

From liability of guarantor, see GUARANTY, 2.

From liability as surety, see PRINCIPAL AND SURETY, 2, 3.

Discovery:

1. DISCOVERY (10)—FAILURE TO ANSWER INTERROGATORIES. Default is properly taken against plaintiffs who refuse to answer interrogatories submitted by defendants calling for facts material to the defense. *Saar v. Weeks*..... 628
2. DISCOVERY (15)—INSPECTION OF WRITING—MATERIALITY. It is not error to refuse to allow plaintiffs an inspection of writings, where defendants struck out all reference thereto, and plaintiffs set out the agreement verbatim in their reply. *Saar v. Weeks*..... 628

Discretion:

Mandamus to compel act within official discretion, see MANDAMUS, 1.

Discretion of Court:

Review of ruling on motion for change of venue, see CRIMINAL LAW, 20.

Allowance of suit money and attorney's fees, see DIVORCE, 3, 4.

To entertain petition in receivership as against receiver, see RECEIVERS.

Dismissal and Nonsuit:

Dismissal of appeal, see APPEAL AND ERROR, 7.

Release of *lis pendens* on dismissing case on merits, see LIS PENDENS.

At trial, see TRIAL, 5.

Dissolution:

Of attachment, see ATTACHMENT.

Districts:

Contest of election for officers of diking district, see ELECTIONS.

Division:

Of property on divorce, see DIVORCE, 5-9.

Divorce:

1. DIVORCE (12)—CONDONATION—ACTS CONSTITUTING. The fact of living with her husband until she brought suit for divorce does not operate as a condonation of conduct amounting to cruelty which

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- consisted of a series of acts and continued course of conduct. *Quient v. Quient* 315
2. SAME (56)—FEES AND COSTS—PAYMENT—RIGHTS OF ATTORNEYS ON SETTLEMENT. After the allowance of temporary alimony and suit money in an action by a husband for a divorce, and the filing of a claim for a lien thereon by the wife's attorneys, who had agreed to conduct the defense for the sums allowed by the court, the attorneys cannot be discharged without payment and the action dismissed through a voluntary settlement; but the attorneys are entitled to enforce the judgment for attorney's fees and suit money, and to have execution therefor under the judgment, upon ascertainment of the amount due by the trial court. *Yoder v. Yoder*..... 491
3. SAME (63)—ATTORNEY'S FEES—DISCRETION. Rem. Code, § 988, rests the matter of allowances for attorney's fees and suit money in an action for divorce wholly in the discretion of the court, which will not be disturbed in the absence of abuse. *Fitzpatrick v. Fitzpatrick* 394
4. DIVORCE (67)—SUIT MONEY—DISCRETION. Where a husband worth a million dollars makes defamatory accusations in an action for divorce, entailing great expense in procuring evidence in and out of the state, a temporary allowance of \$3,000 for attorney's fees and \$1,500 for suit money, is not an abuse of discretion. *Yoder v. Yoder* 491
5. DIVORCE (80)—DIVISION OF PROPERTY—JURISDICTION OF SEPARATE PROPERTY. The jurisdiction in divorce to make a division of the property extends to separate as well as community property, and notwithstanding the parties had exchanged deeds prior to the actions. *Fitzpatrick v. Fitzpatrick*..... 394
6. SAME (80)—DIVISION OF PROPERTY. The matter of fault of the parties to a divorce does not require that one receive a larger proportion of the property than the other. *Fitzpatrick v. Fitzpatrick* 394
7. SAME (80). A wife granted a divorce may not be entitled to the larger portion of the property, in view of mutual fault, the fact that she was employed, and was given the home property and furnishings and relieved from the support of her child. *Fitzpatrick v. Fitzpatrick* 394
8. SAME (80)—DIVISION OF PROPERTY. An allowance to the wife of \$1,000, and the household furniture valued at \$750, and a home valued at \$5,500, in trust for the benefit of a minor child, is not an unfair division, where the balance of the property, worth at least \$6,000, was awarded to the husband, even though it was largely separate property. *Quient v. Quient*..... 315
9. SAME (106)—SUPPORT OF CHILD. The division of property in substantially three equal portions for the husband, wife, and child

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is not inequitable; and the husband, being charged with making the child's portion produce certain sums, is properly given the management of it, although the wife was awarded custody of the child. *Fitzpatrick v. Fitzpatrick*..... 394

Doing Business:

What is, see CORPORATIONS, 9-11.

Drains:

Estoppel of prescriptive owner to interfere with reclamation of lands, see WATERS AND WATER COURSES.

Earnings:

Of wife as separate estate, see HUSBAND AND WIFE, 2, 3.

Easements:

Grant of by cotenant, see TENANCY IN COMMON, 2.

Notice of to purchaser, see VENDOR AND PURCHASER, 2, 3.

1. EASEMENTS (5-7)—PREScriptive RIGHT—EXCLUSIVE AND ADVERSE USE. Where the owner of land acquiesced in the construction of a road across it for the indefinite use of a neighbor, who used it for the necessary period, he acquired a prescriptive right, notwithstanding his use was not exclusive and the road was used by the owner and others; and his hostile or adverse use is sufficiently shown where such use was continuous for a period of thirty years during which time money was expended in repairs and building bridges with no objection by the owner. *Hendrickson v. Sund*.. 406
2. EASEMENTS (10)—EXPRESS GRANTS—CONSTRUCTION. A deed covenanting that the grantor will not build upon adjoining property closer than eight feet to the south line of the property conveyed, so that there shall be sixteen feet between the buildings, grants an easement in the north eight feet of the adjoining land. *Jones v. Berg* 69
3. EASEMENTS — OBSTRUCTIONS — ACTIONS — INCONSISTENT CAUSES. In an action to establish and restrain the obstruction of a private way, an allegation showing plaintiff entitled to a right of way of necessity is not inconsistent with his claim of a right of way by prescription, and it was not error to refuse to require the plaintiff to elect between his two causes of action, where all the facts alleged showed he was relying on his prescriptive right and he did not seek to condemn a right of way of necessity. *Hendrickson v. Sund*..... 406

Election:

Appealability of order requiring election between causes of action, see APPEAL AND ERROR, 2.

Between causes of action to establish and restrain obstruction of private way, see EASEMENTS, 3.

Elections:

1. **ELECTIONS (56) — CONTESTS — JURISDICTION — "PRECINCTS" — DIKING DISTRICT.** A diking district is not a "precinct," within Rem. Code, § 4941, authorizing contests of elections for all county and precinct officers, in view of the diking law, Id., §§ 4091 to 4136, making a diking district an organized public entity, distinct from and free from all control by the county; and in the absence of express statutory authority the courts have no jurisdiction of a contest of an election for commissioners of a diking district. *Whitten v. Silverman*.. 238

Electricity:

1. **ELECTRICITY (4)—INJURIES INCIDENT TO USE—LICENSEES.** A person not a subscriber, injured by shock while using by permission a telephone in a neighbor's private residence, is a mere licensee; and such use not being within the reasonable contemplation of the telephone contract, and telephones not being highly dangerous, the company is not liable in the absence of proof that the injury was wilful, wanton, or malicious; hence proof of the accident does not make a *prima facie* case on the doctrine of *res ipsa loquitur*. *Inman v. Home Telephone & Telegraph Co.*..... 234

Employers' Liability Act:

See MASTER AND SERVANT, 3, 4.

Equity:

See CANCELLATION OF INSTRUMENTS; FRAUDULENT CONVEYANCES; SPECIFIC PERFORMANCE; TRUSTS.

Division of property on divorce, see DIVORCE, 5-9.

Equitable estoppel, see ESTOPPEL.

Escrows:

Delivery of deed in escrow, effect, see DEEDS.

Deposit of mutual deeds of community property, to be delivered on death of either spouse, see HUSBAND AND WIFE, 5.

Establishment:

Of executor's claim against estate, see EXECUTORS AND ADMINISTRATORS, 3, 4.

Estates:

Estates of deceased persons, see EXECUTORS AND ADMINISTRATORS.

Merger of on purchase by tenant, see LANDLORD AND TENANT, 1.

Tenancy in common, see TENANCY IN COMMON.

Estoppel:

Right to raise question for first time on appeal, see APPEAL AND ERROR, 3, 4.

To allege error in civil actions or proceedings, see APPEAL AND ERROR, 13.

Estoppel—Continued.

By admissions of party, see EVIDENCE, 7.

By judgment, see JUDGMENT.

Of prescriptive owner of waters to interfere with reclamation of lands, see WATERS AND WATER COURSES.

1. ESTOPPEL (18, 54)—MINING CLAIMS—PERMITTING IMPROVEMENTS.
A mining company, holding only an inchoate title and right to the possession of mining claims, susceptible to abandonment, is estopped to assert title where it had knowledge at the time of an attempted relocation and stood by two years while the relocators expended a large amount of money in development and disclosed a body of ore, and made no claim until the first car of ore was shipped. *Florence-Rae Copper Co. v. Iowa Mining Co.*..... 503

Eviction:

Of tenant, see LANDLORD AND TENANT, 2, 3.

Evidence:

Review of rulings as dependent on presentation by record, see APPEAL AND ERROR, 8, 9.

Waiver of objections to rulings on, see APPEAL AND ERROR, 13.

Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 23, 26-28.

For attorney's fee, see ATTORNEY AND CLIENT.

In action by bailor for rent and damage to property, see BAILMENT.

For breach of contract, see CONTRACTS, 3, 4.

In actions by or against corporations, see CORPORATIONS, 8, 11.

In prosecution of accessory, see CRIMINAL LAW, 2-4.

In criminal prosecutions in general, see CRIMINAL LAW, 8.

Newly discovered evidence as ground for new trial, see CRIMINAL LAW, 15.

Review of rulings as dependent on presentation of objections in lower court, see CRIMINAL LAW, 18.

Discovery of evidence, see DISCOVERY.

Creation and existence of easement, see EASEMENTS, 1.

To sustain conviction for failure to pay tonnage tax on frozen fish, see FISH, 1.

Of fraud, see FRAUD.

To set aside fraudulent conveyance, see FRAUDULENT CONVEYANCES, 2-5.

For injuries on highway, see HIGHWAYS, 2.

Of previous quarrels, see HOMICIDE, 2.

Separate property of married woman, see HUSBAND AND WIFE, 2.

As to fraud of insured in representing age, see INSURANCE, 3.

In prosecution for larceny, see LARCENY, 3-6.

In action for malicious prosecution, see MALICIOUS PROSECUTION.

In action for wages, see MASTER AND SERVANT, 1.

For injuries to servant, see MASTER AND SERVANT, 5, 8, 9, 11.

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To show priority of senior mortgages and consideration for, see MORTGAGES, 3.

As to application of payments by debtor, see PAYMENT.

Materiality of testimony in prosecution for perjury, see PERJURY, 1, 3.

To sustain conviction of perjury, see PERJURY, 2.

Negligence of dentist, see PHYSICIANS AND SURGEONS, 1.

Authority of agent, see PRINCIPAL AND AGENT, 1.

Credibility of prosecutrix, see RAPE.

For specific performance of contracts, see SPECIFIC PERFORMANCE, 3.

To overcome presumption as to reasonable valuation of coal mining property, see TAXATION, 9.

To set aside tax deeds, see TAXATION, 11, 12.

Reception at trial, see TRIAL, 14.

To establish trust, see TRUSTS, 1.

In actions by or against warehousemen, see WAREHOUSEMEN.

Testamentary capacity, see WILLS, 1.

Competency, attendance, credibility and examination of witnesses, see WITNESSES.

In action for services, see WORK AND LABOR.

1. EVIDENCE (23, 101)—PRESUMPTIONS—CAPACITY TO CONTRACT—ADMISSIONS AGAINST INTEREST. Upon an issue as to whether insured was born in 1862 as represented, or in 1858, his contract made in 1880 with his father is not competent evidence that he was twenty-one at the time, as either raising a presumption that he was competent to contract, or as an admission against interest. *Armstrong v. Modern Woodmen of America*..... 356
2. EVIDENCE (31)—BURDEN OF PROOF—PARTY ASSERTING FACT. In a parent's action for damages on account of medical attendance and expenses in caring for a child, the defendant, having asserted that such items had already been litigated, has the burden of proving the fact. *Flesscher v. Carstens Packing Co.*..... 694
3. EVIDENCE (34)—BURDEN OF PROOF—SHIFTING—PRIMA FACIE CASE. Upon an issue as to whether insured was born in 1862 as represented, or in 1858, proof of death stating that he was born in 1858, while making a prima facie case, does not shift the burden of proof. *Armstrong v. Modern Woodmen of America*..... 356
4. EVIDENCE (52, 93)—STATEMENTS OF AGENT—RES GESTAE. Upon an issue as to the cause for the leakage of gasoline tanks manufactured by the plaintiffs for the defendant, evidence that defendant's plumber, while engaged in connecting up the tanks, stated that he had broken a lug and obtained materials for stopping the leak is admissible as a declaration by an agent within the scope of his employment, and also as part of the *res gestae*. *Haskell v. Carlisle Packing Co.*..... 368
5. SAME (53)—RES GESTAE—STATEMENTS AFTER ACCIDENT. A statement of a roadmaster inspecting a hand-car after an accident is not

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- admissible as part of the *res gestae*. *Harry v. Northern Pac. R. Co.* 469
6. SAME (94, 95)—ADMISSION AFTER TRANSACTION—BY AGENT. A statement of a roadmaster after inspection to determine the cause of an accident, is admissible as the admission of an agent against the interest of his principal. *Harry v. Northern Pac. R. Co.* 469
7. EVIDENCE (98) — ADMISSION — CONCLUSIVENESS — ESTOPPEL. In an action for personal injuries received when a hand-car left the tracks, plaintiff's evidence on cross-examination that he guessed the car was "four or five months old," is not an admission that it was in good condition, and does not estop him from showing that it was out of repair and in an unsafe condition. *Harry v. Northern Pac. R. Co.* 469
8. EVIDENCE (100)—DECLARATIONS—BY PERSON SINCE DECEASED—AGE. Upon an issue as to whether insured was born in 1862 as represented, or in 1868, evidence by insured's son that insured, before making the application for insurance, always claimed he was born in 1862, is admissible. *Armstrong v. Modern Woodmen of America* 356
9. EVIDENCE (153)—PAROL TO VARY WRITING—RECEIPTS. A receipt is not a written contract within the rule against parol evidence, and may be explained or contradicted by parol. *Langford v. Pringle* 277
10. EVIDENCE (167)—PAROL AFFECTING WRITINGS—FRAUD. In an action for fraudulent representations inducing a trade by plaintiff, who could neither read nor write, evidence relating to the conditions under which the instruments were executed is not inadmissible as varying the terms of the written contracts. *Burke v. Mayer*.... 1
11. EVIDENCE (175)—PAROL EVIDENCE TO VARY WRITING—AMBIGUITY. Parol evidence explaining what was meant by "1 car" of flour, and showing amount contained in a car shipped at the time and the manner of shipment, does not alter or add to the written memorandum of sale answering the requirements of the statute of frauds. *Wright v. Seattle Grocery Co.*..... 383
12. EVIDENCE (175)—PAROL TO VARY WRITING—AMBIGUITY. Defendant's contract to "furnish" the plans for a building to be constructed for plaintiff, is not so indefinite or ambiguous as to permit oral evidence to show that plaintiff was familiar with the plans and as a matter of fact furnished them and so would be responsible for their inadequacy. *McConnell v. Gordon Construction Co.*..... 659
13. EVIDENCE (199-1)—OPINION EVIDENCE—DUE CARE—CONCLUSIONS. In an action for injuries sustained by a spectator struck by a foul ball at a baseball game, a witness who was an authority on the game and familiar with the situation may not be asked whether there was sufficient screening of the grand stand for the protection

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of the spectators, as it calls for a conclusion to be drawn only by the jury. *Kavaftan v. Seattle Baseball Club Association*..... 215

14. EVIDENCE (214)—OPINIONS—FACTS FORMING BASIS OF. In an action for personal injuries, a statement by the roadmaster, making an inspection after an accident, "something the matter with the car," is inadmissible as the expression of an opinion, where it was not shown that he was advised as to the rate of speed or circumstances attending the accident. *Harry v. Northern Pac. R. Co.*..... 469

Examination:

Of adverse party before trial, see DISCOVERY.

Of witnesses in general, see WITNESSES.

Exceptions:

Necessity of exceptions to reserve ground for review in criminal prosecution, see CRIMINAL LAW, 19.

Exceptions, Bill of:

Necessity for purpose of review, see APPEAL AND ERROR, 7, 9.

Excessive Damages:

See DAMAGES, 2, 3.

Excuse:

Inability to receive goods at specified time as excuse for delivery, see SALES, 2, 3.

Executors and Administrators:

Objections to failure to present claim against estate, see PLEADING.

1. EXECUTORS AND ADMINISTRATORS (47)—JOINT OR SEVERAL LIABILITY—ACTS OF COEXECUTOR. An executor is not liable for the acts or defaults of his coexecutor unless he has aided, concurred in, or contributed thereto; and an executor will not be held negligent in allowing his coexecutor to so deposit funds in a bank that he could draw them out, where the testator had expressed confidence in the executors, who were to act without bond, and where he was led to believe that it required their joint check to withdraw the funds, and such had been their practice over a long term of years. *In re Hagerty's Estate* 547
2. SAME—FAILURE TO INVEST FUNDS—INTEREST. It is not an abuse of discretion to refuse to charge an executor with interest upon funds remaining in his hands from the time of the settlement of his account until the settlement of a supplemental final account pending an appeal, where it could not be foreseen how long it would be and the funds did not earn interest. *In re Hagerty's Estate*..... 547
3. EXECUTORS AND ADMINISTRATORS (72)—CLAIMS—NECESSITY FOR PRESENTATION AND REJECTION—ACTIONS ON. No contest can be waged

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by an executor on presentation of his claim against the estate until a rejection of the claim by the judge, and then only by suit on the rejected claim, for the bringing of which the executor must resign. *In re Parkes' Estate*..... 586

4. EXECUTORS AND ADMINISTRATORS (72)—CLAIMS OF EXECUTOR—PRESENTATION—PLEADING. A petition filed by the executor of an estate, seeking to establish a claim in his favor against the estate, if treated as a complaint, is demurrable where it contains no allegation that a verified claim therefor was filed and presented to the judge as required by Laws 1917, p. 675, § 120, which is mandatory. *In re Parkes' Estate* 586
5. EXECUTORS AND ADMINISTRATORS (88)—COURTS (51)—PROBATE—JURISDICTION—OUTSIDE CLAIMS—TITLE TO PROPERTY. In the settlement of an estate in probate, the court has no jurisdiction to determine the title to property between outside parties in no way affecting the interests of the estate. *In re Decker's Estate*..... 221
6. EXECUTORS AND ADMINISTRATORS (134) — SALES — VACATION — GROUNDS. A widow interested in an estate, whose offer for a tractor sold by the executors was ten dollars less than the bid of the purchaser to whom sale was made, cannot object to the sale, either as a prospective purchaser or on account of her interest in the estate, where the sale was fairly conducted and as open to her as to the purchaser and brought more than the appraised value. *In re Finn's Estate* 532
7. EXECUTORS AND ADMINISTRATORS (169)—SETTLEMENT OF ACCOUNT—EFFECT—CONCLUSIVENESS. The settlement of the final account of executors fixing their compensation by an order that was a final judicial determination of the amount on hand under their joint control is not *per se* conclusive as to their joint liability for the future acts of one of them, resulting in loss of a portion of the property. *In re Hagerty's Estate* 547

Expert Testimony:

Testimony in civil actions, see EVIDENCE, 13, 14.

Express Trusts:

See TRUSTS, 1.

False Pretenses:

Obtaining goods or money by false pretenses as larceny, see LARCENY, 3, 4.

Fees:

Attorney, see ATTORNEY AND CLIENT.

On foreclosure, see MORTGAGES, 8, 9.

Fellow Servants:

Liability of master for negligence of servants engaged in interstate commerce, see MASTER AND SERVANT, 3, 4.

Filing:

Claim against decedent's estate, see EXECUTORS AND ADMINISTRATORS, 3, 4.

Final Judgment:

Appealability, see APPEAL AND ERROR, 2.

Findings:

Presumptions on appeal, see APPEAL AND ERROR, 17.

Review on appeal or writ of error, see APPEAL AND ERROR, 20, 21.

Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 24.

Fire Insurance:

See INSURANCE, 4.

Fish:

Disposal of oyster lands, see PUBLIC LANDS.

1. FISH (18)—OFFENSES—FAILING TO REPORT TONNAGE TAX. Evidence that fish frozen and preserved by accused might have been caught in Oregon, British Columbia, Alaska, or the state of Washington, does not sustain a conviction for failure to report and pay a tonnage tax on fish frozen by accused, caught within the waters of the state of Washington. *State v. Diamond Ice & Storage Co.*... 122
2. SAME (19) — OFFENSES — INFORMATION — VARIANCE. Under Rem. Code, § 2057, requiring an information to be direct and certain, an information charging failure to report and pay a tonnage tax upon fish frozen and preserved by accused, caught within the state of Washington, does not sustain a conviction for failure to report and pay a tonnage tax upon fish which were caught in the waters of Alaska, British Columbia, or elsewhere, even though that also be an offense under the statute. *State v. Diamond Ice & Storage Co.*... 122

Foreclosure:

Of mortgage, see MORTGAGES, 6, 9.

Of delinquent taxes, see TAXATION, 10-12.

Foreign Corporations:

Service of process on agent of, see CORPORATIONS, 9-12.

Forfeiture:

Of insurance policies, see INSURANCE, 3, 4.

Former Adjudication:

See JUDGMENT.

Fraud:

- In sale of corporate stock as ground of rescission, see CORPORATIONS, 3.
- Parol evidence in action for fraud inducing trade for land, see EVIDENCE, 10.
- By insured, as to age, see INSURANCE, 3.
- Larceny by false pretenses, see LARCENY, 3, 4.
- In appointment of receiver, see RECEIVERS.
- Affecting right to specific performance of contract, see SPECIFIC PERFORMANCE, 2.
- As basis of constructive trust, see TRUSTS, 2.
- Ground for rescission by vendor, see VENDOR AND PURCHASER, 1.
1. FRAUD (7, 8, 22)—RELIANCE ON REPRESENTATIONS AND RELATIONS—EVIDENCE—SUFFICIENCY. Where plaintiff, an old man who was deaf and could neither read nor write, was induced by his confidential agent to make a trade for land belonging to the agent, who concealed his interest in the transaction, plaintiff may rely on representations as to the condition of the lands received in the trade and that they were under irrigation from ditches pointed out, notwithstanding that he visited the land and might have ascertained its true condition and value. *Burke v. Mayer*..... 1
 2. FRAUD (8, 22)—PURCHASER OF LAND—DEFICIENCY IN ACREAGE—EVIDENCE—SUFFICIENCY. Findings that purchasers were not misled to their prejudice by false representations that a tract of land contained twenty acres, are sustained, where the tract was in compact form, its boundaries all in view and pointed out, and the purchasers twice inspected the boundaries and expressed doubt as to the area, but finally accepted deed referring to the land as twenty acres more or less, in view of a dispute in the evidence as to the representations made and the rule that the burden was upon them to show the fraud by clear and convincing evidence. *Hurley v. Lindsay*.... 559
 3. FRAUD (13, 18)—PLEADING—EVIDENCE—ISSUES AND PROOF. Where fraud was alleged inferentially as to representations concerning the financial condition of a company, latitude should be allowed in inquiring into the subject, although there was no direct allegation that the financial condition was misrepresented. *Biel v. Union Fuel & Ice Co.* 41

Frauds, Statute of:

1. FRAUDS, STATUTE OF (37)—SALE OF GOODS—MEMORANDUM—SUFFICIENCY. A memorandum showing the date, name and address of the purchaser and the statement of goods sold with the agreed price, is a sufficient compliance with the statute of frauds, although all the details are not stated and the complaint alleges an agreement partly oral and partly written. *Wright v. Seattle Grocery Co.* 383

Frauds, Statute of—Continued.

2. SAME (37)—SALE OF GOODS—MEMORANDUM—SUFFICIENCY. A memorandum of a sale of flour setting forth the purchaser and seller, the quantity and character of the goods, the price therefor and the date of sale, shows a complete contract and satisfies the statute of frauds, although time and place of delivery were not given. *Wright v. Seattle Grocery Co.*..... 383
3. FRAUDS, STATUTE OF (38)—SALE OF GOODS—MEMORANDUM—SIGNATURE. Rem. Code, § 5290, requiring a note or memorandum of a sale of goods exceeding fifty dollars to be "signed by the party to be charged thereby" is satisfied where it is signed by and may be enforced against the seller, although not signed by the purchaser. *Wright v. Seattle Grocery Co.*..... 383
4. SAME (38)—SALE OF GOODS. The use, by the seller of flour, of a blank form, with its name printed at the top, filled out by its authorized agent showing the terms of the contract of sale, is a sufficient "signing" of the contract by the seller to satisfy the statute of frauds. *Wright v. Seattle Grocery Co.*..... 383

Fraudulent Conveyances:

1. FRAUDULENT CONVEYANCES (4)—BADGES OF FRAUD—EFFECT. Retaining possession of a warranty deed by the grantor in failing circumstances is not alone a sufficient badge of fraud to warrant setting aside, as fraudulent, a deed given to a mortgagee of the premises in satisfaction of the mortgage. *Cashmere State Bank v. Richardson* 105
2. FRAUDULENT CONVEYANCES (34, 92)—PREFERENCES—TO RELATIVES—EVIDENCE—SUFFICIENCY. No fraudulent intent is shown by a sale by a father to a son of ten mules and other property in satisfaction of a debt for \$1,000, where the only evidence as to the consideration was that of father and son which showed it to be adequate, and if the father was insolvent at the time he did not know it. *Rowan v. United States Fidelity & Guaranty Co.*..... 432
3. SAME (41, 95)—PREFERENCES—RETAINING POSSESSION—INTENT—EVIDENCE—SUFFICIENCY. Fraudulent intent in the sale by a father to a son of ten mules and other property in satisfaction of a debt for \$1,000, is not shown by the fact that there was no apparent change of possession, where it appears that they were living together, the son ran the farm, paid the bills, and exercised exclusive control over the property and listed it for assessment as the owner. *Rowan v. United States Fidelity & Guaranty Co.*..... 432
4. SAME (82)—EVIDENCE—BURDEN OF PROOF. In attacking a conveyance as fraudulent, the burden of proof is upon the plaintiff to establish its case, even if no testimony in defense is offered. *Cashmere State Bank v. Richardson.*..... 105

Fraudulent Conveyances—Continued.

5. SAME (97)—EVIDENCE—SUFFICIENCY—CONSIDERATION. Since a debtor in failing circumstances may prefer a creditor, even to the exhaustion of all his property, a conveyance of mortgaged premises in satisfaction of a mortgage will not be set aside as fraudulent unless the consideration is so grossly inadequate as to amount to fraud; and that does not appear where foreclosure was threatened, the transaction was free from concealment or bad faith and after offer to sell the mortgage to a creditor who did not consider it a safe investment. *Cashmere State Bank v. Richardson*..... 105

Funds:

Of estate, liability of executor for interest on, see EXECUTORS AND ADMINISTRATORS, 2.

Future Advances:

Validity of mortgage to secure, see MORTGAGES, 1.

Garnishment:

Construction of attachment and garnishment acts as *in pari materia*, see STATUTES, 2.

1. GARNISHMENT (2)—GROUNDS—EXISTENCE OF "DEBT"—STATUTES. Under Rem. Code, § 680, authorizing a garnishment (1) where an original attachment has been issued, and (2) where plaintiff sues for a "debt," the term "debt" is not limited to sums due on express contract, but is as broad as the term "indebtedness" in the attachment law, construing the statutes as *in pari materia* and tracing the history of legislation on the subject. *State ex rel. American Piano Co. v. Superior Court*..... 676
2. GARNISHMENT (2)—ACTIONS IN WHICH AUTHORIZED—CONVERSION—WAIVER OF TORT. Garnishment lies in an action to set aside a preference under the bankruptcy act, since the tort may be waived and the action based upon implied contract to repay the money obtained, the taking of which was a conversion. *State ex rel. American Piano Co. v. Superior Court*..... 676

Good Faith:

Validity and good faith of mortgage, see MORTGAGES, 1.

Grants:

Of easement, see EASEMENTS, 2.
By one tenant, see TENANCY IN COMMON.

Guaranty:

Rights of creditor on accepting preferred stock under stockholders' guaranty of company debt, see CORPORATIONS, 2.
Contracts of suretyship, see PRINCIPAL AND SURETY.

Guaranty—Continued.

1. **GUARANTY (9)—STOCKHOLDERS' GUARANTY OF CORPORATE DEBT—CONSTRUCTION—EXTENT OF LIABILITY.** A contract whereby stockholders bound themselves to pay the full amount of the company's debt or forfeit the amount of stock set opposite their names, reciting that "this guarantee of payment" is in satisfaction in full of the claim and lien against the company, is a promise to pay in money, to which the privilege of taking stock is collateral, the option being in the promisee; especially where the promisors, in tendering the stock, reserved the right to redeem it at its redemption value. *Leezer v. Fluhart*..... 618
2. **GUARANTY (13)—DISCHARGE—PAYMENT OR SATISFACTION—TENDER.** Under a contract whereby stockholders guaranteed to pay the company's debt in money or by the forfeiture of an aggregate amount of stock, a tender of the stock reserving the right to redeem it under a by-law of the company would be a discharge of the guaranty, since the terms of the by-laws could not be injected into the contract. *Leezer v. Fluhart*..... 618

Guardian and Ward:

Indian wards, taxation of personal property of, see **TAXATION**, 1, 2.

Harmless Error:

In civil actions, see **APPEAL AND ERROR**, 22-31.
 In criminal prosecutions, see **CRIMINAL LAW**, 21.

Heirs:

By adoption, see **ADOPTION**.

Highways:

Notice to contractor of furnishing material to subcontractor, see **COUNTIES**.

Accidents at railroad crossings, see **RAILROADS**.

1. **HIGHWAYS (62)—INJURIES FROM DEFECTS—PROXIMATE CAUSE.** The overloading of an auto stage is no defense to an action by a passenger for injuries sustained through the negligence of the driver in approaching an unsafe culvert, where it was not shown to be the proximate cause or that it contributed thereto. *Dillabough v. Okanogan County* 609
2. **HIGHWAYS (62, 67)—INJURIES FROM DEFECTS—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** A finding of negligence in the construction and maintenance of a culvert is sustained by evidence that engineers advised the county that the proposed culvert was too small to carry off the waters in times of freshets, and that the same was maintained for two years after such fact was demonstrated by washouts, without taking any steps to remedy the defect or warn the public. *Dillabough v. Okanogan County*..... 609

Highways—Continued.

3. SAME (65)—INJURIES FROM DEFECTS—CONTRIBUTORY NEGLIGENCE. It is not negligence *per se* for a traveler by auto. stage to ride in an overloaded car over a muddy, slippery road, in high gear, even in the nighttime. *Dillabough v. Okanogan County*..... 609

Homicide:

1. HOMICIDE (5, 6)—MANSLAUGHTER—ELEMENTS—KILLING WITH DESIGN—STATUTES. Under Rem. Code, §§ 2392-2395, defining murder in the first degree as the killing with premeditated design to effect the death of the person killed, murder in the second degree as the killing with such design but without premeditation, and manslaughter as every other killing not excusable or justifiable, killing with a design to effect death is murder and the element of manslaughter is excluded, even if under provocation or sudden heat of passion. *State v. Hoyer*..... 160
2. SAME (38)—EVIDENCE—ADMISSIBILITY—PREVIOUS QUARRELS. In a prosecution for murder, evidence as to the details of previous quarrels and ill-feeling is admissible to show motive. *State v. Hoyer* 160
3. HOMICIDE (111)—INSTRUCTIONS—SELF-DEFENSE. Upon an issue as to self-defense, an instruction that before the killing there must have been some overt act of the person killed, is not erroneous in failing to use the words "assault with the naked fist," where there was no dispute as to the deceased's having used his hands only in the immediately preceding encounter, in view of proper following instructions from which the jury could not have been misled by the words "overt act." *State v. Hoyer*..... 160
4. SAME (111). In a prosecution for murder where there was evidence that accused armed himself and then provoked an attack and shot the deceased, it is proper to instruct that the right of self-defense is allowed as a shield and not a sword, and that a person must act honestly and not provoke an attack as an excuse for killing. *State v. Hoyer*..... 160

Husband and Wife:

Mutual deeds of community property to be delivered to survivor, see DEEDS, 2.

Divorce and judicial separation, see DIVORCE.

1. HUSBAND AND WIFE (16, 23, 29)—PRESUMPTIONS—WIFE'S SEPARATE PROPERTY AND DEBT. Where a contract for the purchase of lands was made while the vendee was unmarried, and consummated after her marriage, there is no presumption that the lands became community property, even though her husband joined with her in executing a mortgage on her separate property to secure payment, as the obligation was her separate debt. *Blankenship Brothers v. Knox* 416
2. HUSBAND AND WIFE (21, 23-1, 60)—WIFE'S SEPARATE ESTATE—EARNINGS—EVIDENCE—SUFFICIENCY. Where a married man, employed

Husband and Wife—Continued.

- in a pumping plant by a city, made an arrangement whereby the city was to employ and pay his wife wages for assisting, and thereafter receipted for his own wages and made no claim for hers, there was sufficient evidence to support a finding that her wages were her separate property. *Foy v. Pacific Power & Light Co.*..... 525
3. HUSBAND AND WIFE (21)—WIFE'S SEPARATE ESTATE—EARNINGS. A married woman may receive the wages for her personal service, earned under a contract made and performed during coverture, when such earnings were her separate property. *Foy v. Pacific Power & Light Co.*..... 525
4. HUSBAND AND WIFE (24)—SEPARATE ESTATE—AUTHORITY OF HUSBAND. Upon the sale of the separate property of the wife, she has the right to direct application of the proceeds, and any contract by her husband to the contrary would not be binding upon her. *Blankenship Brothers v. Knox*..... 416
5. HUSBAND AND WIFE (63)—COMMUNITY PROPERTY—CONVEYANCES BETWEEN—MUTUAL DEEDS—STATUTES. Simultaneous deeds of community property by husband and wife, placed in escrow, the one to be delivered to the survivor and the other to be null and void or recalled upon the death of the other spouse, do not, under a liberal construction of the code, constitute an agreement concerning the disposition of the community property, within Rem. Code, § 5919, which authorizes the making of such a contract jointly, and provides for the manner of its execution and defines its effect; the statute being exclusive in the absence of any common law right to make such a contract. *Bloor v. Bloor*..... 110
6. HUSBAND AND WIFE (75, 77)—COMMUNITY PROPERTY—WHAT LAW GOVERNS. A debt contracted in Illinois and there the separate debt of the husband cannot be satisfied out of community personalty subsequently acquired by the husband and wife after removal to this state. *Huyvaerts v. Roedtz*..... 657

Impeachment:

Of witness at criminal trial, see CRIMINAL LAW, 8.

Of verdict by testimony or affidavit of jurors, see CRIMINAL LAW, 16.

Implied Contracts:

See WORK AND LABOR.

Improvements:

Permitting improvements as creating estoppel, see ESTOPPEL.

Public improvements, see MUNICIPAL CORPORATIONS, 7.

Imputed Negligence:

See NEGLIGENCE, 2.

In sending brakeman back to protect rear of train, see MASTER AND SERVANT, 6.

Incorporation:

Of towns, see MUNICIPAL CORPORATIONS, 1-4.

Indemnity:

See GUARANTY.

Amount of claims against bond as determining jurisdiction on appeal, see APPEAL AND ERROR, 1.

Contracts of suretyship, see PRINCIPAL AND SURETY.

Index:

Of record of deed as notice, see VENDOR AND PURCHASER, 3.

Indians:

Taxation of personal property of, see TAXATION, 2, 3.

Indictment and Information:

See LABOENY, 1, 2; PERJURY, 1.

Presentation of objections for review, see CRIMINAL LAW, 17.

Violation of fish laws, see FISH, 2.

Infants:

Adoption of, see ADOPTION.

Rape of infant females, see RAPE.

1. INFANTS (16) — JUVENILE OFFENDERS — PUNISHMENT — STATUTES. Under the juvenile court law, Rem. Code, § 1987-1 *et seq.*, defining dependent and delinquent children, which provides, in § 1987-11, that no court shall commit a child under sixteen to a jail, common lockup, or police station, and that when sentenced to any institution to which adult convicts are sentenced, it shall be unlawful to confine such child in a building with such adults, and *Id.*, § 1987-12, authorizing a court to turn a child over to the proper authorities for trial when charged with crime, the word "commit" refers only to detentions pending hearing, and a child may be prosecuted for crime and sentenced to the penitentiary, although not confined in a building with adult convicts; and the fact that the state has not made proper provisions, does not prevent such sentence. *State ex rel. Sowders v. Superior Court*..... 684

Inhabitants:

Determination of number within boundaries of proposed town, see MUNICIPAL CORPORATIONS, 3.

Injunction:

Review of order dissolving temporary injunction, see CERTIORARI.

Restraining obstruction of private way, see EASEMENTS, 3.

Pending action between rival church factions, see RELIGIOUS SOCIETIES.

In Pais:

Estoppel, see ESTOPPEL.

Insolvency:

Assessment on stockholders of insolvent bank, see BANKS AND BANKING.

Preference as fraudulent conveyance, see FRAUDULENT CONVEYANCES, 1, 5.

Inspection:

Right to inspection of writings, see DISCOVERY, 2.

Instructions:

Necessity for incorporating in bill of exceptions, see APPEAL AND ERROR, 7.

Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 29-31.

In criminal prosecutions, see CRIMINAL LAW, 10-14, 19; HOMICIDE, 3, 4; PERJURY, 3, 4.

Review as dependent on exception in lower court, see CRIMINAL LAW, 13, 19.

In civil actions, see TRIAL, 6.

Insurance:

1. INSURANCE (10, 109)—AGENTS OR BROKER—RELATION TO PARTIES—STATUTES—KNOWLEDGE IMPUTED. Under the insurance code, Rem. Code, § 6059-1 *et seq.*, defining an "agent" as the person appointed and authorized to solicit applications and effect insurance, and a "broker" as a person not appointed who acts or aids in any manner in negotiating contracts of insurance for a party other than himself, and requiring larger license fees for brokers than for agents, an insurance concern that makes application to the agents of the company for a policy of marine insurance is a broker and acts as agent of the owners of the boat, so that its knowledge would not be imputed to the company. *Reynolds v. Pacific Marine Insurance Co.* 666
2. INSURANCE (51)—CONSTRUCTION OF CONTRACT—TERM—VOYAGE IN MARINE POLICY. A marginal clause in a policy of marine insurance limiting the policy to the waters of southeastern Alaska, delivered after the sailing of the vessel, will prevail, although unknown to the owners, unless there are facts that estop the company from reliance on the provision. *Reynolds v. Pacific Marine Insurance Co.* 666
3. INSURANCE (83)—AVOIDANCE OF POLICY—FRAUD—MISREPRESENTING AGE—EVIDENCE—SUFFICIENCY. Upon an issue as to misrepresenting the age of insured, a verdict finding that he was born in 1862 as represented, instead of 1858, is supported where witnesses testified in person to that effect, although they were mistaken as to the place

Insurance—Continued.

of birth and were contradicted by numerous witnesses, the question being for the jury. *Armstrong v. Modern Woodmen of America* 356

4. **INSURANCE (91)—POLICY—BREACH—PROVISION AGAINST MORTGAGE—PAYMENT BEFORE LOSS.** Under Rem. Code, § 6059-34, the placing of a chattel mortgage upon property in violation of the terms of a policy of fire insurance does not avoid the policy, where the mortgage was paid and the breach of the policy did not exist at the time of the loss. *Gould v. St. Paul Fire & Marine Insurance Co.*..... 250
5. **SAME (109)—AGENTS—NOTICE—RELIANCE ON APPLICATION.** Where a broker's application for marine insurance expressly specified that the boat was not to be employed in the waters of southwestern Alaska, and the surveyor's report gave the employment of the boat as both the waters of southeastern and southwestern Alaska, the agents of the company writing the insurance were not bound to make inquiry as to whether the insurance desired was that applied for, but were entitled to rely on the application, the rate of insurance being different. *Reynolds v. Pacific Marine Insurance Co.*..... 666

Intent:

Element of fraud as to creditors, see **FRAUDULENT CONVEYANCES**, 2, 3.
 Merger of titles by quitclaim deed to assignee of mortgage, see **MORTGAGES**, 5.

Interest:

- Admissions against interest, see **EVIDENCE**, 1, 6.
 Liability of executor for interest upon funds of estate, see **EXECUTORS AND ADMINISTRATORS**, 2.
1. **INTEREST (7)—DEMANDS NOT LIQUIDATED.** In an action for damages from the collapse of a building interest is recoverable only from the date of the judgment. *McConnell v. Gordon Construction Co.* 659

Interrogatories:

In proceeding for discovery, see **DISCOVERY**.

Intervention:

Time for petition for, see **PARTIES**, 1.

Irrigation:

See **WATERS AND WATER COURSES**.

Joint Tenancy:

See **TENANCY IN COMMON**.
 Partition of joint property, see **PARTITION**.

Judges:

Comment on evidence at criminal trial, see **CRIMINAL LAW**, 10, 11.

Judgment:

Review in general, see **APPEAL AND ERROR**.

Review of error in entering default as dependent on moving against same in lower court, see **APPEAL AND ERROR**, 4.

On appeal, see **APPEAL AND ERROR**, 32, 33.

For failure to answer interrogatories, see **DISCOVERY**, 1.

Right of attorneys to enforce judgment for fees and suit money on voluntary settlement of suit, see **DIVORCE**, 2.

Conclusiveness of order settling administrator's final account, see **EXECUTORS AND ADMINISTRATORS**, 7.

Affirmance on appeal, effect as to rights of debtor to secure offset by payment of mortgage, see **REPLEVIN**.

Reception of certified copy as evidence, see **TRIAL**, 2.

1. **JUDGMENT (200)—CONCLUSIVENESS — PERSONS CONCLUDED—PRIVITY.**
In an action to quiet title, an answer pleading a former adjudication as to the title against the K. lumber company and that plaintiff was identified in interest with such company states facts constituting a defense. *Saar v. Weeks*..... 628

Judicial Power:

Authorizing state bank examiner to make and enforce assessment on stockholders as conferring judicial powers, see **BANKS AND BANKING**, 4.

Judicial Sales:

Of property of decedent, see **EXECUTORS AND ADMINISTRATORS**, 6.

On foreclosure of mortgage, see **MORTGAGES**, 6, 7.

On partition, see **PARTITION**.

Jurisdiction:

Appellate jurisdiction in general, see **APPEAL AND ERROR**, 1, 2.

Of offense by accessory in another state, see **CRIMINAL LAW**, 2.

To make division of property on divorce, see **DIVORCE**, 5.

Election contests, see **ELECTIONS**.

Administration proceedings, see **EXECUTORS AND ADMINISTRATORS**, 5.

Of appellate courts, in mandamus, see **MANDAMUS**, 2.

Jury:

Instructions in criminal prosecutions, see **CRIMINAL LAW**, 10-14, 19.

Impeachment of verdict by testimony or affidavit of jurors, see **CRIMINAL LAW**, 16.

Taking case or question from jury at trial, see **TRIAL**, 5.

Instructions in civil actions, see **TRIAL**, 6.

Knowledge:

As element in creation of estoppel, see **ESTOPPEL**.

Imputed knowledge, see **INSURANCE**, 1.

Labor:

Implied contracts to pay for services, see **WORK AND LABOR**.

Laches:

Constituting estoppel to assert title, see **ESTOPPEL**.

In asserting prescriptive rights to waters, see **WATERS AND WATER COURSES**.

Landlord and Tenant:

Lease of personal property, see **BAILMENT**.

Leases of mining claims, see **MINES AND MINERALS**.

1. **LANDLORD AND TENANT (36)—PURCHASE BY TENANT—MERGER OF ESTATES.** Where a contract for the purchase of mining claims expressly provided that it was subject to a lease which required payment of royalties for a two-year term, consummation of the contract by the lessee to whom it had been assigned does not merge the lease, or dispense with the payment of royalties during the term. *Rayburn v. Stewart-Calvert Co.* 570
2. **LANDLORD AND TENANT (81, 88)—CONSTRUCTIVE EVICTION—REPAIRS—CONSENT OF TENANT.** A tenant cannot claim a constructive eviction by repairs and alterations undertaken at his request and for his benefit, especially where no claim was made until abandonment of the premises and suit brought; his remedy for delay or negligence being an action for damages. *Thompson v. R. B. Realty Co.* 376
3. **SAME (87)—EVICTION—ACTS OF LANDLORD.** The failure of a landlord while making repairs, to keep his promise to put in a new front does not amount to a constructive eviction. *Thompson v. R. B. Realty Co.* 376
4. **LANDLORD AND TENANT (124, 129)—UNLAWFUL DETAINER—DEFENSES.** A tenant holding over after appointment of a receiver in partition proceedings, knowing that the receiver was in possession and that the land was to be partitioned, cannot hold the land or the receiver for payment for summer-fallow under a contract with one of the owners who had no authority to make the contract; notwithstanding the receiver received the rent for the current year. *Womach v. Stuermer* 625

Lands:

See **PUBLIC LANDS**.

Included within corporate limits of town, see **MUNICIPAL CORPORATIONS**, 1, 2.

Larceny:

Prosecution for larceny by accessory, see **CRIMINAL LAW**, 1-4.

Evidence as part of *res gestae*, see **CRIMINAL LAW**, 3.

Instructions, form and language, see **CRIMINAL LAW**, 12.

Larceny—Continued.

Corroboration of state's witnesses in prosecution for, see WITNESSES, 7.

1. **LARCENY (6)—INFORMATION—SUFFICIENCY.** An information sufficiently charges the offense of horse stealing by one assisting therein, where the offense is charged in the language of the applicable portion of Rem. Code, § 2601, defining larceny, and of §§ 2007, 2260, providing that no distinction shall exist between principal and accessories, who may be proceeded against as principals, and where it enables a person of common understanding to know what is intended. *State v. Vane*..... 421
2. **LARCENY (12)—VARIANCE.** A fatal variance in charging the theft of horses belonging to C. Brothers is not shown by evidence of one of the firm who answered "I was," to the question whether he was the owner, where he afterwards used the plural "we," and ownership of the firm was testified to by another witness. *State v. Vane* 421
3. **LARCENY (24)—EVIDENCE—MATTERS OF DEFENSE—REPARATION.** Larceny by obtaining money under false pretenses is not expunged by restoring the money. *State v. Cadwell*..... 689
4. **SAME.** Where the state, in a prosecution for larceny, introduced evidence of promises to make restitution and failure to do so, for the purpose of showing guilty intent, the accused should be allowed to show a tender or any other facts tending to show performance of promises to repay or excusing such performance. *State v. Cadwell* 689
5. **LARCENY (25) — EVIDENCE — SUFFICIENCY.** Evidence that, two months after sleds were stolen, they were found in a building which was in the care of the accused at the time of the offense, but not when discovered, and to which others had access is insufficient to sustain a conviction of grand larceny. *State v. Schimmels*..... 151
6. **LARCENY (25, 28) — EVIDENCE — SUFFICIENCY.** The positive testimony of two accomplices that accused assisted and participated in the stealing of horses, sustains a conviction of larceny; the credibility of the witnesses being for the jury. *State v. Brantff*..... 327

Last Clear Chance:

To avoid accident, see RAILROADS, 1.

Leases:

See LANDLORD AND TENANT.

Licensee:

Injury to while using telephone, see ELECTRICITY.

Liens:

Mortgage liens, see MORTGAGES.

Lieu Lands:

- Taxation of lands of state subject to lieu land selections, see TAXATION, 4-6.

Life Insurance:

- See INSURANCE, 3.

Limitation:

- Of amount affecting jurisdiction on appeal, see APPEAL AND ERROR, 1.
- Of risks and liability of insurers, see INSURANCE, 2.

Limitation of Actions:

- Time for taking appeal or other proceeding for review, see APPEAL AND ERROR, 5, 6.

Lis Pendens:

1. LIS PENDENS (6)—RELEASE—DISMISSAL. Upon dismissal of a case on the merits, it is proper to clear the record of any cloud by releasing the *lis pendens*. *Cashmere State Bank v. Richardson* 105

Live Stock:

- Power of state to tax live stock of Indian ward, see TAXATION, 1, 2.

Locus:

- Of contract, see CONTRACTS, 1.

Machinery:

- Liability of employer for defects in machinery or appliances, see MASTER AND SERVANT, 7, 9.

Malicious Prosecution:

1. MALICIOUS PROSECUTION (14)—PROBABLE CAUSE—ADMISSIBILITY. In an action for malicious prosecution, under a general denial the defendant may show probable cause by proof of a full and true disclosure to the prosecuting attorney who directed the filing of the complaint. *Borg v. Bringham*..... 521
2. MALICIOUS PROSECUTION (14-1)—EVIDENCE—ADMISSIBILITY—REASON FOR DISMISSAL. In an action for malicious prosecution, the plaintiff, in making a prima facie case by proof of dismissal of the criminal charge, is not entitled to show the reason for the dismissal by the examining magistrate. *Borg v. Bringham*..... 521
3. SAME (3, 15)—PROBABLE CAUSE—ADVICE OF PROSECUTOR—EVIDENCE—SUFFICIENCY. Probable cause for a criminal prosecution is established as a matter of law, by a full and true disclosure of the facts to the prosecuting attorney who directed institution of the proceedings; and it is immaterial that the evidence was largely hearsay, and insufficient to secure conviction. *Borg v. Bringham*..... 521

Malpractice:

By dentist, see **PHYSICIANS AND SURGEONS**.

Mandamus:

1. **MANDAMUS (33-36)—TO OFFICERS—CONTROLLING DISCRETION.** A plain case is required before the prosecuting attorney will be required to file an information in quo warranto to test the validity of the incorporation of a town. *State ex rel. Cummings v. Johnson* 93
2. **MANDAMUS (70)—JURISDICTION—APPELLATE COURTS—AMOUNT IN CONTROVERSY.** In view of Constitution, art. 4, § 4, limiting the appellate jurisdiction of the supreme court, mandamus does not lie to compel the superior court to dismiss an action at law for the recovery of money where the original amount in controversy was less than \$200. *State ex rel. Swan v. Superior Court*..... 167

Mandate:

To lower court on decision on appeal or writ of error, see **APPEAL AND ERROR**, 32, 33.

Manslaughter:

See **HOMICIDE**, 1.

Marine Insurance:

See **INSURANCE**, 1, 2, 5.

Married Women:

See **HUSBAND AND WIFE**.

Master and Servant:

Recovery for services on implied contract, see **WORK AND LABOR**.

1. **MASTER AND SERVANT (17)—ACTION FOR WAGES—EVIDENCE—SUFFICIENCY.** A verdict allowing \$45 per month for services is not excessive, the question being for the jury, where plaintiff worked as a cook and farm hand, the going wages for which were from \$25 to \$45 per month, and also worked long hours and performed other duties requiring more skill. *Thomas v. Thomas*..... 127
2. **MASTER AND SERVANT (20-1)—WORKMEN'S COMPENSATION ACT—ADMIRALTY JURISDICTION.** The workmen's compensation act, Rem. Code, § 6604-1 *et seq.*, does not apply to workmen employed exclusively upon a dredge at work in the navigable waters of the state subject to admiralty jurisdiction; but it applies to employees of the dredger who are engaged solely on the land; and as to employees engaged partly on the land and partly on the dredge, the industrial insurance commission is entitled to collect premiums in proportion to the time spent in either employment, so far as the same can be segregated and determined. *Puget Sound Bridge & Dredging Co. v. Industrial Insurance Commission* 272

Master and Servant—Continued.

3. **SAME (20-2)—INJURY—FEDERAL LIABILITY ACT—FELLOW SERVANTS—STATUTES.** The effect of section 1 of the Federal Employers' Liability act (U. S. Comp. St., § 8657) is to abolish the doctrine of non-liability for the negligence of fellow servants engaged in interstate commerce and to put negligence on the part of fellow servants on a par with negligence of the master; and this, regardless of the other sections of the act relating to contributory negligence and assumption of risks; since a servant does not assume the risks of negligence of a fellow servant where the act was not habitual or usual. *Cules v. Northern Pac. R. Co.* 281
4. **MASTER AND SERVANT (54, 57)—INJURIES—METHODS OF WORK—SIGNALS—LOADING CARS—NEGLIGENCE OF FELLOW SERVANTS.** Under the Federal Employers' Liability act, it is actionable negligence upon the part of fellow servants, engaged in loading rails by pushing them up skids, for part of the crew at one end to disregard signals and fail to wait for the final signal calling for concerted action, whereby, through their hasty action, the other end slipped back and injured a member of the crew. *Cules v. Northern Pac. R. Co.*..... 281
5. **MASTER AND SERVANT (55)—NEGLIGENCE—OPERATION OF RAILROADS—LOOKOUT—EVIDENCE—SUFFICIENCY.** In an action under the Federal liability act for the wrongful death of an employee, struck by a train pulling into a station, there was no evidence of negligence in the failure of the train crew to keep a lookout for the deceased, where the undisputed testimony shows that the engineer on the train kept a lookout except for two or three times when he pulled his head into the cab because of snow flurries, and the fireman had his head out of the cab all of the time and kept a constant lookout; especially where there was nothing to indicate that failure to keep a lookout was the proximate cause of the death. *Miller v. Great Northern R. Co.* 349
6. **MASTER AND SERVANT (55, 155) — INJURIES — OPERATION OF RAILROADS—IMPUTED NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.** Negligence cannot be imputed in the sending of a brakeman back to protect the rear of a train from the fact that trains were expected from both directions; and the statement to him that the west-bound train might be the first to arrive did not warrant him in failing to protect himself against trains coming from the other direction. *Prall v. Great Northern R. Co.*..... 24
7. **MASTER AND SERVANT (90-92, 161)—INJURIES TO SERVANT—ASSUMPTION OF RISK.** A railroad construction hand daily using and riding on a hand-car does not, as a matter of law, assume the risk if it is in bad repair. *Harry v. Northern Pac. R. Co.*..... 469
8. **SAME (92)—INJURIES—EVIDENCE—CAUSE OF DEATH—CONJECTURE.** No recovery can be had for the death of a brakeman, sent back to protect the rear of a train, trains being expected from both direc-

Master and Servant—Continued.

tions, where there was no eyewitness to the accident and the cause of the death was left entirely to speculation and conjecture. *Prall v. Great Northern R. Co.*..... 24

9. MASTER AND SERVANT (135)—INJURIES TO SERVANT—DEFECTIVE HAND-CAR—EVIDENCE—ADMISSIBILITY. In an action for personal injuries, sustained when a hand-car jumped the track and was found with one wheel off, in which there was no evidence of any defect other than such as related to the wheels, evidence as to wiring any other part of the car is inadmissible unless connected with the cause of the accident. *Harry v. Northern Pac. R. Co.*..... 469
10. MASTER AND SERVANT (172)—INJURY TO THIRD PERSON—SCOPE OF EMPLOYMENT—TRANSFER OF MOTOR AND DRIVER. Where a truck, with a driver in the employ of the owner, was hired by the day to a contractor, who had full control of its operation, the driver is the servant of the hirer, and the owner would not be liable to a third person injured by the driver's negligence. *Olsen v. Veness.*..... 599
11. MASTER AND SERVANT (174)—INJURY TO THIRD PERSON—LIABILITY OF MASTER—EVIDENCE—SUFFICIENCY. Where the explosion of a gasoline tank on a boat was caused by the carelessness of a member of the crew in spraying distillate over the deck and over a lighted lantern negligently placed near the opening in the tank, in attempting to transfer the distillate to the boat after being ordered not to do so, defendants, the owner of the vessel and the contracting company furnishing the distillate, having no knowledge of the matter, are not liable for the death of another member of the crew, killed by the explosion. *Vlastelica v. Baretich.*..... 638

Materiality:

Allegations of materiality of evidence in indictment for perjury, see PERJURY, 1.

Measure of Damages:

See DAMAGES, 1.

For malpractice by dentist, see PHYSICIANS AND SURGEONS, 3.

In action for failure to deliver goods sold, see SALES, 5.

Mechanics' Liens:

Amount of claim against bond as determining jurisdiction on appeal, see APPEAL AND ERROR, 1.

Contractor's bond to secure laborers and materialmen on public work, see MUNICIPAL CORPORATIONS, 5-7.

Memoranda:

Required by statute of frauds, see FRAUDS, STATUTE OF.

Mental Capacity:

To execute a will, see WILLS, 1.

Merger:

- Of tenancy, on purchase by tenant under assigned contract, see LANDLORD AND TENANT, 1.
- By conveyance of mortgaged property to mortgagee, see MORTGAGES, 5.

Method of Work:

- Negligence of fellow servants in disregarding signals in loading cars, see MASTER AND SERVANT, 4.

Mines and Minerals:

- Estoppel to assert title to mining claim, see ESTOPPEL.
- Merger of lease, on purchase by lessee of claims under assigned contract, see LANDLORD AND TENANT, 1.
- Valuation of coal mining property for taxation, see TAXATION, 7-9.
- 1. MINES AND MINERALS (17)—SALE OF CLAIMS—RIGHTS OF PURCHASER. Unlawful detainer does not lie against the lessee of mining claims which had acquired a contract to purchase the claims, subject to the payment of royalties under the lease, and had consummated the contract according to its terms paying the full price to a bank to await patent and deed; as it was entitled to possession as owner, subject to payment of the royalties. *Rayburn v. Stewart-Calvert Co.* 575
- 2. SAME. In such a case, the fact that the lessee had sought to acquire title from another source, is immaterial, where it waived its right to a United States patent through the owner, and the purchase price was on deposit in the bank to be paid on execution of a deed. *Rayburn v. Stewart-Calvert Co.*..... 575

Minors:

- Prosecution and punishment of juvenile offenders, see INFANTS.

Misconduct:

- Of counsel ground for reversal in criminal prosecutions, see CRIMINAL LAW, 21.

Misjoinder:

- Defects in parties, waiver of objections, see PARTIES, 3.

Misrepresentation:

- See FRAUD.
- By corporation in sale of shares, see CORPORATIONS, 3.
- By insured, see INSURANCE, 3.
- Affecting right to specific performance of contracts, see SPECIFIC PERFORMANCE, 2.
- Ground for rescission by vendor, see VENDOR AND PURCHASER, 1.

Modification:

- Of decision on appeal, see APPEAL AND ERROR, 32, 33.

Money:

Larceny of by false pretenses, see LARCENY, 3, 4.

Tender of sum due, see TENDER.

Mortgages:

Conveyance of mortgaged premises in satisfaction of debt, see FRAUDULENT CONVEYANCES, 1, 5.

1. MORTGAGES (8)—DEBTS SECURED—VALIDITY—GOOD FAITH. The good faith and validity of a senior mortgage is sustained by the fact that it was largely given for an antecedent indebtedness then existing, and to cover future advances to be made, and that a future advance was made very shortly after its execution and delivery. *Watson v. Barnard* 536
2. SAME (57)—BONA FIDE HOLDER—PREEXISTING DEBT. Where a subsequent mortgage was taken for a pre-existing debt, the mortgagee is not a holder for value as against a prior mortgage supposed by him to be released. *Connecticut Investment Co. v. Demick*..... 265
3. SAME (57, 185)—PRIORITY—CONSIDERATION—EVIDENCE. Upon an issue as to the priority of senior mortgages, a *prima facie* case is made by the showing that they were given for money loaned, by introducing the notes and mortgages, and proof of nonpayment and the recording; and shows they were given for a valuable consideration. *Watson v. Barnard*..... 536
4. SAME (60)—PRIORITY—NOTICE—BURDEN OF PROOF. The burden is upon a junior mortgagee to show by clear and convincing evidence that mortgages of prior record were given with actual notice of his mortgage, or of facts sufficient to put upon inquiry. *Watson v. Barnard* 536
5. MORTGAGES (109, 110)—MERGER OF TITLES—INTENTION—EXPRESS AGREEMENT. A second mortgage, assigned to an investment company, is not merged by a quitclaim deed to the assignee with an agreement to reconvey, the deed being given to secure advances for taxes, where that was not the intention, there being an express agreement that the mortgage remain in force and payments made thereon. *Connecticut Investment Co. v. Demick*..... 265
6. MORTGAGES (212, 213)—FORECLOSURE—SALE—SHERIFF'S RETURN—AMENDMENT. After confirmation of a mortgage foreclosure sale, at which the purchaser bid and paid the full amount claimed as due by the sheriff, whose return showed satisfaction of the judgment, the return cannot be amended to show a deficiency, although the mistake as to the amount was inadvertent, where mortgagors, liable on the judgment, had secured the purchaser under an agreement to convey their equity of redemption; since they could not recoup their loss by redemption and there was no excuse for failure to object to the return before confirmation. *Bird v. Cox*..... 51

Mortgages—Continued.

7. SAME (233-235)—FORECLOSURE — APPLICATION OF PROCEEDS — PRIORITY. Where a first mortgage was given on an undivided three-fourths of a quarter section, a second mortgage upon the whole tract, a third mortgage upon an undivided one-fourth, and a fourth mortgage upon the whole tract, the third mortgage could not be satisfied out of the proceeds of the sale of the undivided one-fourth, because the second mortgage was a prior lien thereon, after satisfaction of the first mortgage. *Watson v. Barnard*..... 536
8. MORTGAGES (243)—FORECLOSURE — ATTORNEY'S FEES — STIPULATION IN NOTE. A mortgage note containing a promise to pay a reasonable attorney's fee, in case suit is instituted to collect the note, entitled attorneys in a foreclosure action to a reasonable fee upon a settlement and discontinuance of the foreclosure. *Owens v. Bausman* 412
9. MORTGAGES (243)—FORECLOSURE—ATTORNEY'S FEES. In an action to foreclose a junior mortgage providing for an attorney's fee of \$50, and for personal judgment on the mortgage note, which provided for a reasonable attorney's fee, the foreclosure can include only the \$50 fee, but personal judgment may be entered upon the judgment for a reasonable fee; in view of Rem. Code, § 475, which authorizes a reasonable fee on foreclosure of the mortgages in the sum to be fixed by the court, not exceeding the fee fixed by the contract. *Watson v. Barnard*..... 536

Motions:

Quash or vacate attachment, see ATTACHMENT.

Municipal Corporations:

Mandamus to compel filing of information in *quo warranto* to test validity of incorporation of town, see MANDAMUS, 1.

Collision of street cars with persons or vehicles on track, see STREET RAILROADS.

1. MUNICIPAL CORPORATIONS (4). Although platted for agricultural or garden purposes, lands may be included within the corporate limits of a town as platted land, where they were surveyed and subdivided into small tracts, designated by lot numbers, with streets named. *State ex rel. Cummings v. Johnson*..... 93
2. SAME (4)—TERRITORY INCLUDED—UNPLATTED LANDS. Under Rem. Code, § 7481, providing that no more than 20 acres of unplatted land belonging to one person may be included within the corporate limits of a town of the fourth class, the inclusion of 20 acres and the exclusion of 22.15 acres of one owner is proper. *State ex rel. Cummings v. Johnson* 93
3. MUNICIPAL CORPORATIONS (8)—INCORPORATION—DETERMINATION OF INHABITANTS—CONCLUSIVENESS. Under Rem. Code, § 7435, giving

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- the county commissioners the power to ascertain and determine the number of inhabitants within the boundaries of a proposed town, their decision is conclusive, unless reviewed under the appeal statute, Id., § 3909. *State ex rel. Cummings v. Johnson*..... 93
4. MUNICIPAL CORPORATIONS (8)—INCORPORATION—VALIDITY. Where the county commissioners had jurisdiction of the incorporation of a town, and did not act in excess thereof, the questions decided by them are reviewable only on appeal. *State ex rel. Cummings v. Johnson* 93
5. MUNICIPAL CORPORATIONS (158)—SCHOOLS AND SCHOOL DISTRICTS (28)—CONTRACTOR'S BONDS—PERSONS SECURED—SUPPLIES. A bond given by a contractor in compliance with Rem. Code, § 1159, to secure all persons furnishing provisions and supplies for carrying on the work of constructing a heating plant in a schoolhouse, covers sums due for sheet metal furnished in good faith to a subcontractor to be used in the building, although, due to the fault of the subcontractor, all of it was not used in the construction of the plant. *Western Hardware & Metal Co. v. Maryland Casualty Co.*..... 54
6. SAME—LIABILITY. Liability attaches in such case, although the sheet metal was not delivered at or near the school building, where the delivery was made at the shop of the subcontractor, it being necessary to there prepare it for use on the job, and the work of preparing it was being actually done there. *Western Hardware & Metal Co. v. Maryland Casualty Co.*..... 54
7. MUNICIPAL CORPORATIONS (159-1)—PUBLIC IMPROVEMENTS—CONTRACTOR'S BONDS—"SUPPLIES"—NOTICE. A subcontractor supplying a man and team on municipal work furnishes "labor" to the extent of the man's wages, and "supplies" in the use of the team; and under Rem. Code, § 1159-1, cannot recover on the contractor's bond for the value of the "supplies," where he failed to give notice thereof within ten days of furnishing the same as required by the act. *Ledingham v. Blaine*..... 253
8. MUNICIPAL CORPORATIONS (383)—USE OF HIGHWAY—CONTRIBUTORY NEGLIGENCE—COLLIDING WITH AUTOMOBILE. One riding a bicycle near the middle of a city street in the daytime, with a plain view ahead for several blocks, is guilty of contributory negligence, as a matter of law, in failing to see and in colliding with an automobile, driven in a straight line in the opposite direction, there being no other vehicle near. *Tyrell v. Leege*..... 438

Murder:

See HOMICIDE.

Mutual Deeds:

Of community property, see DEEDS, 2.

Navigable Waters:

Bodies and streams of water not capable of navigation, see **WATERS AND WATER COURSES**.

Negligence:

In taking up passengers, see **CARRIERS**.

Damages in general, see **DAMAGES**.

Injury through electric shock, see **ELECTRICITY**.

Liability for acts of co-executor, see **EXECUTORS AND ADMINISTRATORS**, 1.

Defects or obstructions in highways, see **HIGHWAYS**.

Of employers, see **MASTER AND SERVANT**.

Malpractice by dentist, see **PHYSICIANS AND SURGEONS**.

Accidents at railroad crossings, see **RAILROADS**.

In failing to screen section of grand stand at ball park, see **THEATERS AND SHOWS**.

1. **NEGLIGENCE—SALE OF INJURIOUS REMEDIES—LIABILITY OF STATE AGENT.** An agent handling the sale in certain states, but in no way connected with the manufacture, of a secret process remedy, misrepresented to make fruit trees healthier, is not liable for damages caused by use of the remedy purchased from another agent; since there can be no liability in the absence of privity, where the thing sold was not of a noxious or dangerous kind and the defendant did not make the sale and was guilty of no fraud, deceit or negligence with reference to the sale or manufacture. *Kramer v. Carboliteum Wood Preserving Co.*..... 401
2. **NEGLIGENCE (22-1)—IMPUTED NEGLIGENCE—DRIVER AND PASSENGER.** The negligence of the driver of an auto stage in approaching an unsafe culvert over a slippery road, in high gear, cannot be imputed to a passenger. *Dillabough v. Okanogan County*..... 609

Negotiable Instruments:

See **BILLS AND NOTES**.

Newly Discovered Evidence:

Ground for new trial, see **CRIMINAL LAW**, 15.

New Parties:

See **PARTIES**, 1, 2.

New Trial:

Effect of motion for new trial on time to appeal, see **APPEAL AND ERROR**, 5, 6.

In criminal prosecutions, see **CRIMINAL LAW**, 15, 16.

Nonsuit:

On trial, see **TRIAL**, 5.

Notes:

Promissory notes, see **BILLS AND NOTES**, 1.

Notice:

Of appeal, time for service, see **APPEAL AND ERROR**, 6.

To contractor of furnishing materials to subcontractor, see **COUNTIES**.

Notice of pendency of action, see **LIS PENDENS**.

Of prior mortgage, see **MORTGAGES**, 4.

Of furnishing supplies to contractor on public work, see **MUNICIPAL CORPORATIONS**, 7.

To owner of delinquent taxes, see **TAXATION**, 10.

Affecting bona fides of purchase of land, see **VENDOR AND PURCHASER**, 2-4.

Oath:

False swearing, see **PERJURY**.

Objections:

Review as dependent on objection made on trial, see **APPEAL AND ERROR**, 3.

Necessity of rulings on objections for purposes of review, see **CRIMINAL LAW**, 13, 17, 18.

To parties plaintiff, waiver of, see **PARTIES**, 3.

Obstructions:

Enjoining obstruction of private way, see **EASEMENTS**, 3.

Officers:

Contest of election for, see **ELECTIONS**.

Mandamus, see **MANDAMUS**, 1.

Enjoining control by, pending action by rival church factions, see **RELIGIOUS SOCIETIES**.

Opening Statement:

Exclusion of by court at criminal trial, see **CRIMINAL LAW**, 8.

Opinion Evidence:

In civil actions, see **EVIDENCE**, 13, 14.

Oral Evidence:

To vary writings, see **EVIDENCE**, 9-12.

Orders:

Review of appealable orders, see **APPEAL AND ERROR**, 2.

Review of, see **CERTIORARI**.

Disobedience of as contempt, see **CONTEMPT**.

Oyster Lands:

Disposal of, see **PUBLIC LANDS**.

Parent and Child:

Adoption of children, see **ADOPTION**.

Damages for loss of services of child, see **DAMAGES**, 3.

Pari Materia:

Construction of statutes, see **STATUTES**, 2.

Parol Evidence:

See **EVIDENCE**, 9-12.

To establish trust, see **TRUSTS**, 1.

Parties:

Rights and liabilities as to costs, see **COSTS**.

Charged with burden of proof, see **EVIDENCE**, 2.

Concluded by judgment, see **JUDGMENT**.

Secured by contractor's bond, see **MUNICIPAL CORPORATIONS**, 5-7.

Right of agent to sue as real party in interest, see **PRINCIPAL AND AGENT**, 2.

Change of as discharging surety, see **PRINCIPAL AND SURETY**, 2, 3.

Entitled to bring action to cancel tax against state lands, see **TAXATION**, 6.

1. **PARTIES (37)—NEW PARTIES—TIME FOR INTERVENTION.** A petition charging fraud and collusion in a receivership and seeking to bring in new parties is too late as a petition for intervention, when it was not filed until three years after appointment of the receiver and final judgment on plaintiff's claim. *Nevin v. Pacific Coast & Norway Packing Co.* 192
2. **PARTIES (43, 44)—METHOD OF BRINGING IN NEW PARTIES—CITATION.** In receivership proceedings, upon petition for an accounting and to discharge the receiver, parties other than the receiver cannot be cited to show cause on ten days' notice why they should not be brought in as parties defendants, as such substitute for summons would ignore the statute, Rem. Code, § 220. *Nevin v. Pacific Coast & Norway Packing Co.* 192
3. **PARTIES (51)—REAL PARTY IN INTEREST—OBJECTIONS—WAIVER.** An objection that a married woman is not the real party in interest, in her action to recover for wages upon her contract made during coverture is waived if not made when the defendant first appears in the action. *Foy v. Pacific Power & Light Co.* 525

Partition:

See **TENANCY IN COMMON**.

1. **PARTITION (22)—RECEIVERS (60)—SALES—TITLE OF PURCHASER.** Where land was sold at receiver's sale in partition proceedings, the purchaser took the entire title, free from a tenant's claim for summer-fallowing not of record. *Womach v. Stuermer* 625

Partnership:

Formation of as discharging surety on bond of individual, see **PRINCIPAL AND SURETY**, 2, 3.

Passengers:

Negligence of driver of auto stage imputed to passenger, see **NEGLIGENCE**, 2.

Payment:

See **TENDER**.

Rights of attorneys to payment on settlement of divorce suit, see **DIVORCE**, 2.

As discharging guaranty to pay corporate debt, see **GUARANTY**, 2.

Of chattel mortgage before loss as avoiding breach of policy, see **INSURANCE**, 4.

Application of proceeds of foreclosure sale, see **MORTGAGES**, 7.

Construction of will as to payment of debts, see **WILLS**, 2.

1. **PAYMENT (12, 29) — APPLICATION — EVIDENCE.** Findings that a debtor, interested in part of the proceeds of the sale of sheep, directed application of her part to the payment of her separate indebtedness are sustained, where her testimony was supported by that of another witness and by surrounding circumstances, and her adversaries' testimony was unsupported. *Blankenship Brothers v. Knox* 416

Performance:

Of contract for services, see **ATTORNEY AND CLIENT**.

Perjury:

Conviction of as affecting competency of witness, see **CRIMINAL LAW**, 5.

1. **PERJURY (4)—INFORMATION—MATERIALITY OF EVIDENCE.** An information for perjury sufficiently charges the materiality of the testimony, within Rem. Code, § 2351, defining perjury, even if insufficient at common law, where it alleges that accused wilfully testified falsely "to the following material facts in the case," setting forth the testimony; in view of Rem. Code, §§ 2065, 2066, providing for charging a crime in ordinary language, and that no information shall be deemed insufficient when it clearly indicates the offense and the person charged. *State v. Vane*..... 170
2. **SAME (6)—EVIDENCE—SUFFICIENCY.** In a prosecution for perjury, where the only issue was as to whether defendant was honestly mistaken, a conviction is sustained, where the authenticity of corroborating evidence as to dates offered by the defendant was successfully challenged by the state. *State v. Vane*..... 170
3. **PERJURY (7)—INSTRUCTIONS—MATERIALITY OF EVIDENCE.** In a prosecution for perjury the determination of the materiality of the

Perjury—Continued.

evidence is not left to the jury by the giving of an instruction that the jury must find that all material allegations of the information have been proven beyond a reasonable doubt, where the jury were told that the matters charged in the information were all material matters in the case in question. *State v. Vane*..... 170

4. SAME (7)—INSTRUCTIONS—CORROBORATION. In a prosecution for perjury, an instruction upon the subject of corroboration of the defendant is not called for, where the testimony was admitted and the claim made that it was given under an honest mistake. *State v. Vane*..... 170

Personal Injuries:

See NEGLIGENCE, 2.

To passenger, see CARRIERS.

Caused by electricity, see ELECTRICITY.

Admissibility of evidence as *res gestae* in action for injuries, see EVIDENCE, 5.

To passenger in auto stage, see HIGHWAYS.

To employee or third person, see MASTER AND SERVANT.

To person in city street, see MUNICIPAL CORPORATIONS, 8.

To traveler on highway crossing railroad, see RAILROADS.

To persons on or near street railroad tracks, see STREET RAILROADS.

To spectator at ball game struck by foul ball, see THEATERS AND SHOWS.

Personal Property:

Measure of damages for injuries to personal property, see DAMAGES, 1, 2.

Requirements of statute of frauds, see FRAUDS, STATUTE OF.

Taxation of property of Indians, see TAXATION, 1, 2.

Personal Taxes:

See TAXATION, 1, 2.

Petition:

For intervention in receivership proceedings, time for, see PARTIES, 1.

Physicians and Surgeons:

Confidential communication between physician and patient, see WITNESSES, 1-3.

1. PHYSICIANS AND SURGEONS (10-1, 11)—NEGLIGENCE—EVIDENCE—SUFFICIENCY. A recovery for negligence in doing dental work is sustained by evidence that the work was to be done to plaintiff's satisfaction, there was some evidence of negligent work, and he refused to correct it upon complaints made. *Reeves v. Wilson*..... 318

Physicians and Surgeons—Continued.

2. **SAME (12)—NEGLIGENCE—INSTRUCTIONS.** In an action for malpractice by a dentist, in which the patient later contracted blood poisoning not attributable to the teeth, an instruction is favorable to the defendant where it charges that, if the plaintiff was suffering from a diseased condition which the injury aggravated, he was entitled to recover all damages actually flowing from the injury, except such as must have followed in case the defendant's negligence had not intervened. *Reeves v. Wilson*..... 318
3. **SAME (13)—NEGLIGENCE—MEASURE OF DAMAGES.** In an action for malpractice by a dentist, the measure of damages is actual compensation for loss and suffering caused by the negligent performance of the work, and not recovery of the expense of replacing it. *Reeves v. Wilson*..... 318

Place:

- Of execution of contract, see **CONTRACTS**, 1.
- Jurisdiction of offense by accessory in another state, see **CRIMINAL LAW**, 2.
- For delivery of goods sold, see **SALES**, 1.

Plats:

- Including platted and unplatted lands in corporate limits of town, see **MUNICIPAL CORPORATIONS**, 1, 2.

Pleading:

- Review of rulings as dependent on presentation of objection in lower court, see **APPEAL AND ERROR**, 3.
 - Review of rulings as dependent on presentation of same by record, see **APPEAL AND ERROR**, 10.
 - Presumption as to amendment, see **APPEAL AND ERROR**, 14-16.
 - Action to enforce claim against estate, see **EXECUTORS AND ADMINISTRATORS**, 4.
 - In actions for fraud, see **FRAUD**, 3.
 - Former judgment as plea in bar, see **JUDGMENT**.
 - In action for services, see **WORK AND LABOR**, 2.
1. **PLEADING (199)—OBJECTIONS—FAILURE TO STATE CAUSE OF ACTION.** The objection that no claim was presented under the statute of non-claim, may be first presented at the trial by objection that the complaint does not state facts sufficient to state a cause of action. *In re Parkes' Estate* 586

Policy:

- Of insurance, see **INSURANCE**.

Population:

- Determination by county board on incorporation of town, see **MUNICIPAL CORPORATIONS**, 3.

Possession:

Retention by grantor in fraudulent conveyance, see FRAUDULENT CONVEYANCES, 1, 3.

Powers:

Of state bank examiner to make and enforce assessment on stockholders of insolvent bank, see BANKS AND BANKING.
Of commercial corporation to engage in practice of law, see CORPORATIONS, 4.
Of state to tax property of Indian ward, see TAXATION, 1, 2.

Practice:

See APPEAL AND ERROR; COSTS; CRIMINAL LAW; PARTIES.

Practice of Law:

Power of commercial corporation to engage in, see CORPORATIONS, 4.

Precincts:

Contest of elections for precinct officers, see ELECTIONS.

Preferences:

In fraudulent conveyance, see FRAUDULENT CONVEYANCES, 3, 5.
Garnishment in action to set aside preference under bankruptcy act, see GARNISHMENT, 2.

Preferred Rights:

Issuance of by corporation, see CORPORATIONS, 1, 3.

Prejudice:

Ground for reversal in civil actions, see APPEAL AND ERROR, 22-31.
Ground for reversal in criminal prosecution, see CRIMINAL LAW, 21.

Premeditation:

See HOMICIDE.

Prescription:

See WATERS AND WATER COURSES.
Acquisition of rights, see EASEMENTS, 1.

Presentment:

Of claim against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 3, 4.
Objections to failure to present claim against estate, see PLEADING.

Presumptions:

On appeal, see APPEAL AND ERROR, 17.
In civil actions, see EVIDENCE, 1.
As to community nature of property, see HUSBAND AND WIFE, 1.
As to time and place for delivery of goods, see SALES, 1.
As to reasonableness of assessed valuation of coal lands, see TAXATION, 9.

Prima Facie Case:

See EVIDENCE, 3.

Principal and Accessory:

See CRIMINAL LAW, 1-4.

Principal and Agent:

Agent of corporation for purpose of service of process, see CORPORATIONS, 8, 9, 12.

Declarations of agent as evidence, see EVIDENCE, 4-6.

Admissions by agent as evidence, see EVIDENCE, 6.

Insurance agents, see INSURANCE, 1, 5.

Master's liability for wrongful acts or commissions of servant, see MASTER AND SERVANT, 10, 11.

Liability of state agent on sale of injurious remedies, see NEGLIGENCE, 1.

1. **PRINCIPAL AND AGENT (34)—SALES AGENT—AUTHORITY.** The authority of an agent to make a sale of flour is sufficiently shown by evidence that he had been a salesman for the principal for six years, actively engaged in soliciting orders and making such sales, his authority never having been questioned before. *Wright v. Seattle Grocery Co.* 383
2. **SAME (51)—AGENT'S RIGHT TO SUE.** An agent acting individually in buying flour and making the contract, may sue thereon in his own name as the real party in interest. *Wright v. Seattle Grocery Co.* 383
3. **PRINCIPAL AND AGENT (58)—RATIFICATION IN GENERAL.** There was sufficient evidence that an agent's contract was made in behalf of a partnership where the partners ratified what he had done. *Wegener v. Peterson* 564

Principal and Surety:

Contracts of guaranty, see GUARANTY.

Liabilities of sureties on contractor's bond, see MUNICIPAL CORPORATIONS, 5-7.

Construction of act giving right of action on contractor's bond, see STATUTES, 1.

1. **PRINCIPAL AND SURETY (13-1)—LIABILITY OF SURETY—SUPPLIES.** A bond conditioned for the performance of a logging contract and the repayment of all sums advanced by the obligee to the principal for labor and lien claims, does not permit recovery for "supplies" furnished by the obligee to the principal, since that was beyond the contemplation of the bond. *Willapa Construction Co. v. Shahour* 341
2. **PRINCIPAL AND SURETY (26)—DISCHARGE OF SURETY—CHANGE OF PARTIES.** The surety upon a bond guaranteeing the contracts of an individual is discharged and not liable, where thereafter such in-

Principal and Surety—Continued.

dividual entered into a partnership and the contracts sought to be enforced were made with the partnership. *Spokane Union Stockyards Co. v. Maryland Casualty Co.*..... 306

3. SAME. The obligee on a bond taken to guarantee the contracts of an individual doing business under an assumed name is under some obligation to inform itself of the formation of a partnership which would discharge the surety as to contracts thereafter made; and cannot plead ignorance thereof, where it knew that the principal had entered into a partnership and failed to inform itself as to the extent of the partnership. *Spokane Union Stockyards Co. v. Maryland Casualty Co.*..... 306

Priorities:

Of mortgages, see MORTGAGES, 2-4, 7.

Private Roads:

Rights of way, see EASEMENTS, 1, 3.

Privilege:

Of accused, see WITNESSES, 1-3.

Privileged Communications:

Disclosure by witness, see WITNESSES, 1-3.

Probable Cause:

For prosecution, see MALICIOUS PROSECUTION.

Probate:

Administration of estates of decedents, see EXECUTORS AND ADMINISTRATORS.

Process:

Corporations in general, see CORPORATIONS, 8-12.

Prohibition:

1. PROHIBITION (4)—ADEQUACY OF REMEDY BY APPEAL—INABILITY TO GIVE BAIL. The fact that one convicted of crime cannot give bail is no reason for reviewing errors of the trial court by the extraordinary writ of prohibition. *State ex rel. Sowders v. Superior Court* 684

Promissory Notes:

See BILLS AND NOTES, 1.

Promoters:

Of corporation, see CORPORATIONS, 5-7.

Property:

Damages for injury to personal property, see DAMAGES, 1, 2.
Division of on divorce, see DIVORCE, 5-9.

Property—Continued.

Jurisdiction to determine outside claims in settlement of estate, see EXECUTORS AND ADMINISTRATORS, 5.

Separate or community nature of, see HUSBAND AND WIFE.

Property subject to taxation, see TAXATION, 1, 2, 4-6.

Proximate Cause:

Of injury to passenger in auto stage, see HIGHWAYS, 1.

Of accident at crossing, see RAILROADS, 1.

Publication:

Of summons in foreclosure proceedings, see TAXATION, 11.

Public Improvements:

By cities, see MUNICIPAL CORPORATIONS, 7.

Public Lands:

Taxation of state lands, see TAXATION, 4-6.

1. PUBLIC LANDS (101)—FISH (3)—OYSTER LANDS—DISPOSAL BY STATE—STATUTES. The "Callow" act, Rem. Code, §§ 6806, 6807, providing for the sale of natural or artificial oyster beds to persons cultivating oysters thereon, authorizes the sale of oyster beds whether planted upon tide lands or upon lands below tide lands; in view of Rem. Code, § 6641, which defines tide lands as all lands over which the tide ebbs and flows from the line of ordinary high tide to the line of extreme low tide "excepting oyster reserves"; the intent of which is to except oyster lands from the definition of tide lands, whether upon tide lands or not. *Hurley v. Olympia Oyster Co.*... 244

Punishment:

Of juvenile offenders, see INFANTS.

Quarrels:

Evidence of previous quarrels, in prosecution for murder, see HOMICIDE, 2.

Quashing:

Attachment, see ATTACHMENT.

Question for Jury:

Credibility of witnesses, see CRIMINAL LAW, 9.

Negligence of driver of auto truck at crossing, see RAILROADS, 6.

Contributory negligence of spectator at ball game struck by foul ball, see THEATERS AND SHOWS, 2.

Quo Warranto:

Right to mandamus to test validity of incorporation of town, see MANDAMUS, 1.

Railroads:

Injuries to passengers, see **CARRIERS**.

Injuries to employees, see **MASTER AND SERVANT**, 3-9.

Contributory negligence of brakeman struck by engine, see **MASTER AND SERVANT**, 6.

Injuries to persons on or near street railway tracks, see **STREET RAILROADS**.

1. **RAILROADS (62)—OPERATION—ACCIDENTS AT CROSSING—PROXIMATE CAUSE—LAST CLEAR CHANCE.** Where the driver of an auto truck drove upon a farm crossing in front of a rapidly approaching passenger train, in the daytime, having a clear view of the train, upon a straight track, and did not at any time stop, look or listen, the doctrine of last clear chance to avoid the accident does not apply, on the theory that his truck had to wait upon a parallel track upon which a freight train half a mile away was approaching, where such train was so far away as not to be a factor, and the trainmen had no reason to believe that the truck, which was moving slowly, would not come to a stop and wait. *Miller v. Northern Pac. R. Co.* . . . 645
2. **RAILROADS (66)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—DUTY TO LOOK AND LISTEN.** Plaintiff was not guilty of contributory negligence, as a matter of law, in driving an automobile upon a country railroad crossing, upon a dark night, when he was struck by a locomotive running rapidly backwards without the usual headlight or any warning signals, where he looked before driving on the crossing for an approaching train, and saw none; the negligence of the company being largely responsible for his conduct. *Hines v. Chicago, Milwaukee & St. Paul R. Co.* 178
3. **RAILROADS (66)—OPERATION—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE—DUTY TO STOP, LOOK AND LISTEN.** The driver of an auto truck is guilty of contributory negligence, precluding recovery for his death, where he drove upon his farm crossing in front of a rapidly approaching passenger train, in the daytime, having a clear view of the train upon a straight track, and did not at any time stop, look or listen. *Miller v. Northern Pac. R. Co.* 645
4. **RAILROADS (66)—OPERATION—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE—DUTY TO STOP, LOOK AND LISTEN.** A farm employee who had been driving an auto truck, and who turned the wheel over to his employer just before reaching a farm crossing, retaining a seat beside him, is guilty of contributory negligence, precluding recovery for his death, in failing to keep a lookout and observe a passenger train then due, rapidly approaching from his side upon a straight track in full view. *Hoyle v. Northern Pac. R. Co.* 652
5. **RAILROADS (66, 67)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—DUTY—OBSTRUCTED VIEW.** Plaintiff was guilty of contributory negligence as a matter of law, in driving his automobile upon a railroad crossing, on the theory that a person taking no precau-

Railroads—Continued.

tions is not entitled to any presumption that a train was not exceeding the speed limit, where he was familiar with the situation and train schedule, and only listened momentarily before nearing the crossing, his vision on approaching was obstructed by a freight car on a side track, and he drove in low gear past the obstruction without looking until upon the track, when others in no better position by looking saw the train. *Golay v. Northern Pac. R. Co.* 132

6. RAILROADS (66, 67, 71)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—DUTY—OBSTRUCTED VIEW—QUESTION FOR JURY. Deceased was not guilty of contributory negligence, as a matter of law, in driving an auto truck upon a railroad crossing, upon the theory that a person who has exercised some degree of care in apprising himself of the approach of a train has a right to assume that any approaching train is operating at a lawful speed, and the question is for the jury, where it appears that his view on approaching was obstructed and that he looked first in one direction and then in the other, failing to see the train, and there was evidence from which the jury may have found that he might have seen the approaching train if it had been running at a lawful rate of speed, or had warning been given, and that no bell or whistle was sounded until it was too late for him to stop the auto. *Brandt v. Northern Pac. R. Co.* 138

Rape:

Examination of witnesses, in prosecution for, see WITNESSES, 5, 6.

1. RAPE (17)—EVIDENCE—CREDIBILITY OF PROSECUTRIX. In a prosecution for statutory rape of one under the age of consent, it is improper to ask the prosecuting witness whether any one had ever hugged or kissed her before, as it did not imply unchastity, even if that could be shown to affect her credibility. *State v. Grant* 189

Ratification:

Of act of agent, see PRINCIPAL AND AGENT, 3.

Real Property:

Conveyance, see VENDOR AND PURCHASER.

Rebuttal:

Evidence, see TRIAL, 3.

Recall:

Of remittitur on appeal, see APPEAL AND ERROR, 33.

Receipts:

Parol evidence varying receipts, see EVIDENCE, 9.

Receivers:

Bringing in new parties in receivership proceedings, see PARTIES, 1, 2.

Sale of land at receiver's sale in partition proceedings, see PARTITION.

Receivers—Continued.

1. **RECEIVERS (75, 80)—ACTIONS—REMEDIES AGAINST RECEIVER IN RECEIVERSHIP.** Upon charges of fraud and collusion in the appointment of a receiver, challenging the validity of the receivership and all the orders made therein, involving others not parties, it is discretionary with the trial court to refuse to entertain a petition in the receivership and to relegate the petitioner to an independent action. *Nevin v. Pacific Coast & Norway Packing Co.*..... 192

Records:

Transcript on appeal or writ of error, see **APPEAL AND ERROR**, 7-12.

Reception of as evidence, see **TRIAL**, 2.

As notice affecting bona fides of purchase of land, see **VENDOR AND PURCHASER**, 2-4.

Release:

Of *lis pendens*, on dismissal of case, see **LIS PENDENS**.

Liability as surety, see **PRINCIPAL AND SURETY**, 2, 3.

Reliance:

On representations inducing trade for land, see **FRAUD**, 1.

By agents on application for marine insurance, see **INSURANCE**, 5.

Religious Societies:

1. **RELIGIOUS SOCIETIES (5)—CONTROL—ACTIONS—INJUNCTION.** A temporary injunction, pending determination of the merits of an action between rival church factions, is properly granted where plaintiff trustees were in possession and conducting the business of the church much as had been done, and restraint was necessary to prevent loss of corporate functions and property. *Eternal Truth Spiritualist Church of America v. Stuber*..... 154

Remand:

Of cause on appeal or writ of error, see **APPEAL AND ERROR**, 32, 33.

Remittitur:

Recall by supreme court, see **APPEAL AND ERROR**, 33.

Reopening Case:

Review of rulings as dependent on presentation of same by record, see **APPEAL AND ERROR**, 8.

For further evidence, see **TRIAL**, 4.

Repairs:

As constituting eviction, see **LANDLORD AND TENANT**, 2, 3.

Reparation:

As matter of defense in larceny, see **LARCENY**, 3, 4.

Replevin:

1. REPLEVIN (52) — JUDGMENT — APPEAL — DECISION — OFFSET. Upon affirmance of a judgment in replevin for the return of an automobile or its value, the debtor cannot, by paying off a mortgage on the automobile, acquire an offset against the amount of the recovery for the value at the time of the rendition of the judgment in the trial court. *Hartford v. Stout*..... 46

Requests:

For instructions in criminal prosecutions, see CRIMINAL LAW, 14.
Designation of instructions as requested by party, see TRIAL, 6.

Rescission:

Of contract of sale of stock, see CORPORATIONS, 3.
Of contract for sale of land, see VENDOR AND PURCHASER, 1.

Res Gestae:

In criminal prosecutions, see CRIMINAL LAW, 3.
In civil actions, see EVIDENCE, 4, 5.

Res Ipsa Loquitur:

See ELECTRICITY.

Res Judicata:

See JUDGMENT.
Conclusiveness of order settling administrator's final account, see EXECUTORS AND ADMINISTRATORS, 7.

Restrictions:

Notice of building restrictions, see VENDOR AND PURCHASER, 2-4.

Return:

Of order of sale under decree of foreclosure, see MORTGAGES, 6.

Revenue:

See TAXATION.

Review:

See CERTIORARI; PROHIBITION.
In civil actions, see APPEAL AND ERROR.
In criminal prosecution, see CRIMINAL LAW, 13, 17-21.
Of questions decided by county board on incorporation of town, see MUNICIPAL CORPORATIONS, 4.

Right of Way:

Easements, see EASEMENTS, 1, 3.

Risks:

Assumed by employee, see MASTER AND SERVANT, 3, 7.

Roads:

See HIGHWAYS.

Right of way by prescription, see EASEMENTS, 1, 3.

Streets in cities, see MUNICIPAL CORPORATIONS, 8.

Sales:

Of corporate stock, see CORPORATIONS, 3.

Parol evidence to vary contract of sale, see EVIDENCE, 11.

By executor or administrator, see EXECUTORS AND ADMINISTRATORS, 6.

Requirements of statute of frauds, see FRAUDS, STATUTE OF.

In fraud of creditors, see FRAUDULENT CONVEYANCES.

Of separate property of wife, see HUSBAND AND WIFE, 4.

Of mines, see MINES AND MINERALS.

Foreclosure sales, see MORTGAGES, 6, 7.

Liability of agent for sale of injurious remedy, see NEGLIGENCE, 1.

Authority of agent to sell, see PRINCIPAL AND AGENT, 1.

Fraud as defense to enforcement of contract for sale of goods, see SPECIFIC PERFORMANCE, 2.

Sufficiency of tender of sum due on conditional sales contract, see TENDER, 2.

Of real property, see VENDOR AND PURCHASER.

1. SALES (34, 35)—DELIVERY—TIME AND PLACE. Where the time and place of delivery of goods sold are not specified there is a presumption of a reasonable time; and both parties doing business in the same city, a like presumption fixes that point as the place of delivery. *Wright v. Seattle Grocery Co.*..... 383
2. SALES (77)—FAILURE TO DELIVER—EXCUSE—BREACH. Where a contract for the sale of bulk wheat required delivery within a certain time at a specified warehouse, inability of the warehouse to receive it within the time specified does not absolve the seller from making delivery as one of the concurrent acts which he assumed, and he is liable in damages, where he declares the contract at an end and makes no effort to make delivery at any place (overruled on rehearing). *Farmers Grain & Supply Co. v. Lemley*..... 508
3. SAME (77). Where a contract for the sale of bulk wheat, required delivery within a certain time at a specified warehouse, inability of the warehouse to receive it within the time specified absolves the seller from making delivery and puts an end to the contract, where the buyer, upon notice of the conditions, failed to provide any place where delivery could be made without additional labor or expense on the part of the seller. *Farmers Grain & Supply Co. v. Lemley*..... 508
4. SALES (127, 128)—ACTION FOR PRICE—DEFENSES—SET-OFF—DEFECTS. Where gasoline tanks manufactured for defendant had a substantial value, and are retained by the defendant without giving plaintiffs

Sales—Continued.

an opportunity to repair or remove them, he cannot defend an action for the price on the ground of defective workmanship, but must pay the price with the understanding that plaintiffs would be liable for damages for breach of warranty if they were not fit for the use for which they were made. *Haskell v. Carlisle Packing Co.*..... 368

5. SALES (154-156)—ACTION FOR BREACH—DAMAGES. In an action for failure to deliver flour sold, where there was no dispute as to the market value of the brand sold, the question of market value should have been withdrawn, and the jury instructed to assess damages in a sum equal to the difference between the contract price and the market value. *Wright v. Seattle Grocery Co.*..... 383

School Lands:

Taxation of school lands in possession of patentee, pending lieu land selections, see TAXATION, 4-6.

Schools and School Districts:

Liability of surety on bond of contractor installing heating plant in schoolhouse, see MUNICIPAL CORPORATIONS, 5, 6.

Self-Defense:

Defenses in prosecution for homicide, see HOMICIDE, 3, 4.

Sentence:

Punishment of juvenile offenders, see INFANTS.

Separate Estate:

Jurisdiction to make division of on divorce, see DIVORCE, 5.

Of married women, see HUSBAND AND WIFE, 1-4.

Services:

Damages for loss of services of child, see DAMAGES, 3.

Compensation of employee, see MASTER AND SERVANT, 1.

Implied contract to pay for services, see WORK AND LABOR.

Servitudes:

See EASEMENTS.

Set-off and Counterclaim:

Right of debtor to offset by payment of mortgage, after affirmance of judgment on appeal, see REPLEVIN.

In action for price of goods sold, see SALES, 4.

Settlement:

Rights of attorneys on voluntary settlement of divorce suit, see DIVORCE, 2.

Of final account of executors, effect, see EXECUTORS AND ADMINISTRATORS, 7.

Severance:

Of cotenancy, see TENANCY IN COMMON.

Sheriffs and Constables:

Amendment of sheriff's return on foreclosure of mortgage, see MORTGAGES, 6.

Shifting:

Burden of proof, see EVIDENCE, 3.

Shipping:

Construction of marine insurance policy, see INSURANCE, 2.

Signatures:

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 3, 4.

Specific Performance:

1. SPECIFIC PERFORMANCE (11)—CONTRACTS ENFORCEABLE—INVALID CONTRACT FOR ADOPTION. A contract for adoption will not be specifically enforced, so as to give a right of inheritance, because of a good faith attempt to make the adoption by contract, where there was at the time no authority in law for an adoption. *Wall v. McEnnery's Estate* 445
2. SPECIFIC PERFORMANCE (20)—DEFENSES—FRAUD. Specific performance of a contract for the sale of a stock of goods to an undisclosed principal will not be decreed where it was induced by false representations that one C. was not the undisclosed principal, and the contract was executory to the extent that the purchaser was to participate in making an invoice, and C. was a competitor to whom the vendor would not sell. *Cohn v. Knabb*..... 363
3. SAME (25, 51)—WILLS (8-1)—CONTRACT TO DEVISE—EVIDENCE—SUFFICIENCY. A contract by foster parents to "leave" property in consideration of services performed by one who was never legally adopted, will not be specifically enforced unless clearly proved, and it is not sufficient to show services as a child, that she was sent to school, and that the foster parents had stated that they had adopted her, and that she was their heir and would inherit their property without the making of any will. *Wall v. McEnnery's Estate*.... 445

State Bank Examiner:

Power to make and enforce assessment upon stockholders of insolvent bank, see BANKS AND BANKING.

Statement:

Of case or facts for purpose of review, see APPEAL AND ERROR, 7, 9, 10.

States:

Disposal of oyster lands, see PUBLIC LANDS.

Power to tax property of Indian ward, see TAXATION, 1, 2.

Taxation of property of state, see TAXATION, 4-6.

Statutes:

See FRAUDS, STATUTE OF.

Enforcement of liability of stockholders of insolvent bank, see BANKS AND BANKING.

Construction of statutes authorizing garnishment, see GARNISHMENT, 1.

Defining murder, see HOMICIDE, 1.

Conveyances of community property, see HUSBAND AND WIFE, 5.

Prosecution and punishment of juvenile offenders, see INFANTS.

Insurance laws, see INSURANCE, 1, 4.

Application of workmen's compensation act, see MASTER AND SERVANT, 2.

Effect of Federal Employers' liability act on liability for negligence of fellow servants in interstate commerce, see MASTER AND SERVANT, 3, 4.

Incorporation of cities and towns, see MUNICIPAL CORPORATIONS, 2, 3.

Sale of oyster lands by state, see PUBLIC LANDS.

1. STATUTES (69)—CONSTRUCTION—REFERENCE TO OTHER STATUTES. It will be assumed that the judicial definition of "supplies" prior to Rem. Code, § 1159-1, giving a right of action on a contractor's bond, was incorporated therein on the passage of that act. *Ledingham v. Blaine* 253
2. STATUTES (71)—CONSTRUCTION—REFERENCE TO OTHER ACTS. The attachment and garnishment acts, the latter authorizing garnishment where a writ of attachment has issued, are to be considered as *in pari materia*. *State ex rel. American Piano Co. v. Superior Court* 676

Stock:

Corporate stock, see CORPORATIONS, 2, 5-7.

Stockholders:

Enforcement of liability of, see BANKS AND BANKING.

Of corporations, see CORPORATIONS, 2, 3.

Street Railroads:

Injuries to passengers, see CARRIERS.

1. STREET RAILROADS (20)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—DRIVER OF AUTO. The driver of an automobile, struck by a cable car at a street crossing, is guilty of contributory negligence, as a matter of law, where he saw the approaching car in ample time to have stopped, instead of which he speeded up in an attempt to cross ahead, expecting the car to slow down; and having seen the car, it is immaterial that no signal or alarm bell was sounded. *Blanchard v. Puget Sound Traction, Light & Power Co.* 226

Streets:

See MUNICIPAL CORPORATIONS, 8.

Subrogation:

Rights of promoters to subrogation on default of company in paying for land, see **CORPORATIONS**, 6.

Suit Money:

In action for divorce, see **DIVORCE**, 2-4.

Summons:

Service on agent of foreign corporation, see **CORPORATIONS**, 9-12.

In tax foreclosure proceedings, see **TAXATION**, 11.

Supplies:

Liability of surety to persons furnishing supplies to contractor, see **MUNICIPAL CORPORATIONS**, 5-7.

Liability of surety for under contract bond, see **PRINCIPAL AND SURETY**, 1.

Support:

Division of property for support of child, see **DIVORCE**, 9.

Suretyship:

See **PRINCIPAL AND SURETY**.

Taxation:

Prosecution for failure to report and pay tonnage tax on fish frozen, see **FISH**.

1. **TAXATION (2) — POWER OF STATE — INDIANS (10-1) — PERSONAL PROPERTY.** Sheep and their increase, purchased with the proceeds of stock and its increase issued by the United States Government to an Indian upon a reservation as a ward of the government, are not subject to taxation; as the Indian is a ward of the government, which does not part with title by the issuance of property to him. *Olney v. McNair*..... 18
2. **SAME.** The fact that money was borrowed to care for the sheep, or that the owner had prospered and was an officer in a bank, does not discredit his direct evidence that no stock was ever purchased except with proceeds of issued property and its increase, or make him any the less a ward of the government. *Olney v. McNair*.. 18
3. **TAXATION (6) — UNIFORMITY — EXCLUSION FROM INCORPORATED TOWN.** The exclusion from the corporate limits of a town of a portion of the owner's agricultural lands is not a violation of the constitutional provision of uniformity of taxation; since the same cannot be taxed for municipal purposes. *State ex rel. Cummings v. Johnson* 93
4. **TAXATION (34, 37) — STATE LANDS — LIEU LAND SELECTIONS — TITLE IN ABEYANCE.** Under the enabling act, granting sections 16 and 36 to the state for school purposes, lands patented before survey and

Taxation—Continued.

- found on extension of the survey to be within section 36, the title to which had by suit been quieted in the state, although the patentee was left in possession pending settlement of lieu land selections, is not subject to taxation, since the title was in the state regardless of the suit to quiet title. *Ortman v. Kittitas County*..... 144
5. SAME. Under Rem. Code, § 6635-3, providing for lieu land selections in exchange for sections 16 and 36 in Federal Forest Reserves, and requiring conveyance by the state when title to the selected lands became vested in the state, title to the school lands remains in the state until the conditions are fulfilled, and are not subject to taxation; notwithstanding a patentee from the government in possession may thereupon become the owner by compliance with the state or Federal conditions therefor. *Ortman v. Kittitas County* 144
 6. SAME (34, 200)—STATE LANDS—RIGHT OF ACTION TO SET ASIDE TAX. A patentee from the government prior to survey, of land in section 36, the title to which had been quieted in the state, but who was left in possession pending negotiations of lieu land selections which would probably result in his becoming the owner of the land, may maintain an action to cancel taxes improperly assessed against the land while the title was in the state. *Ortman v. Kittitas County* 144
 7. TAXATION (59)—VALUATION—MINING PROPERTY. An assessment of coal lands at from \$5 to \$15 per acre for coal values is not void as arbitrary and without the exercise of discretion, where the deputy making the assessment made an investigation on the land and based his judgment thereon and on information gained from coal owners, miners and prospectors. *Washington Union Coal Co. v. Thurston County* 208
 8. SAME (59). Coal mining property surrounding a proven mine may be given an assessed valuation as such where there is reason to find and believe that it has coal values. *Washington Union Coal Co. v. Thurston County*..... 203
 9. SAME (96, 210)—PRESUMPTION—REASONABLENESS—EVIDENCE—SUFFICIENCY. The presumption in favor of the reasonableness of the assessed valuation of coal mining property must be overcome by clear and satisfactory evidence, and this is not done where it appears that further prospecting work and investigation was necessary before the company's engineer could give his opinion as to whether it contained coal that could be mined at a profit. *Washington Union Coal Co. v. Thurston County*..... 293
 10. SAME (151-154)—FORECLOSURE—NOTICE TO OWNER. The owner of property is chargeable with knowledge of the delinquency of taxes and of every step in the tax foreclosure. *Larson v. Murphy*.... 36
 11. TAXATION (153, 209)—FORECLOSURE—SUMMONS BY PUBLICATION—EVIDENCE TO SET ASIDE. In an action to set aside tax deeds, the evi-

Taxation—Continued.

dence shows that plaintiff in a tax foreclosure used due diligence and was unable to locate the owner for personal service before resorting to service by publication, where it appears that diligent inquiry was prosecuted without success and that the owner had left the city without leaving any address. *Larson v. Murphy*..... 36

12. SAME (163)—TAX TITLE—CONCLUSIVENESS—BURDEN OF PROOF. The burden is upon the one who asserts the invalidity of a tax title to overcome the deed by competent and controlling evidence. *Larson v. Murphy*..... 36

Telegraphs and Telephones:

Personal injuries to person using telephone, see ELECTRICITY.

Tenancy in Common:

Partition of property held in common, see PARTITION.

Conveyances by cotenants, see VENDOR AND PURCHASER, 2-4.

1. TENANCY IN COMMON (1-1)—SEVERANCE—GRANTS BY ONE TENANT. A conveyance by one of two tenants in common of part of the common property is valid as a transfer of the grantor's interest, entitling the grantee to equities therein against the nongranting tenant in case of a partition. *Jones v. Berg*..... 69
2. SAME (1-1)—CONFIRMATION. Where one of two tenants in common conveys part of the common property, together with an easement in the remainder, pursuant to an oral agreement with his cotenant, a subsequent quitclaim deed by both cotenants of the remainder is a confirmation of the previous oral agreement and a recognition of the easement, avoiding the necessity of a formal partition between the cotenants. *Jones v. Berg*..... 69

Tender:

As discharging guaranty, see GUARANTY, 2.

1. TENDER (4)—MODE AND SUFFICIENCY—PAYMENT INTO COURT. After suit brought, it is not a sufficient tender to leave money with a third person to be handed to plaintiff's attorney, and in the case of a legal action, to fail to bring the money into court. *Vergonis v. Vaseleou* 441
2. TENDER (7)—CONDITIONS—CONDITIONAL SALES CONTRACT. A tender of the sum due on a conditional sales contract, conditioned on receiving an absolute conveyance of the property, is insufficient, where payment was a condition precedent to passing title, and the contract provided that title should be absolute on full payment and did not contemplate any additional conveyance. *Vergonis v. Vaseleou*.. 441

Testamentary Capacity:

See WILLS, 1.

Theaters and Shows:

1. THEATERS AND SHOWS (2)—BASEBALL EXHIBITION—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Evidence by defendant to the effect that a grand stand at a baseball park was screened from foul balls for sixty feet on each side of the center, in accordance with plans for the structure, raises an implication or admission of negligence in failing to protect spectators by screens for more than thirty feet on each side of the center. *Kavafian v. Seattle Baseball Club Association* 215
2. SAME (2) — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. Whether a spectator at a ball game, struck by a foul ball, was guilty of contributory negligence or assumed the risk, in taking a seat in the grand stand unprotected by screens when there were vacant seats so protected, involves the question whether he acted as a reasonably prudent person, relying on the implied representation that his seat was reasonably safe, and is for the jury (overruled on rehearing). *Kavafian v. Seattle Baseball Club Association*..... 215
3. THEATERS AND SHOWS (2)—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS. A spectator, at a ball game, struck by a foul ball, who voluntarily took and retained a seat in the unscreened section of the grand stand when there were a great number of vacant seats protected by screens that he might have chosen, assumes the risks or is guilty of contributory negligence precluding any recovery. *Kavafian v. Seattle Baseball Club Association*..... 215

Tide Lands:

See PUBLIC LANDS.

Time:

For taking appeal or suing out writ of error, see APPEAL AND ERROR, 5, 6.
 For allowance of interest, see INTEREST.
 For intervening, see PARTIES, 1.
 For delivery of goods sold, see SALES, 1.

Title:

Estoppel to assert title, see ESTOPPEL.
 Jurisdiction to determine outside claims to property in settlement of estate, see EXECUTORS AND ADMINISTRATORS, 5.
 Retention of apparent title by grantor, see FRAUDULENT CONVEYANCES, 1, 3.
 Merger of titles, see MORTGAGES, 5.
 Of purchaser at receiver's sale in partition proceedings, see PARTITION.
 Tax titles, see TAXATION, 11, 12.
 Records in chain of title, see VENDOR AND PURCHASER, 2.
 To support action for conversion, see WAREHOUSEMEN.

Torts:

- See FRAUD; MALICIOUS PROSECUTION; NEGLIGENCE.
- Measure of damages, see DAMAGES.
- Liability for torts of coexecutor, see EXECUTORS AND ADMINISTRATORS, 1, 7.
- Waiver of in action to set aside preference under bankruptcy act, see GARNISHMENT, 2.
- Injuries caused by defects or obstructions in road, see HIGHWAYS.
- Of employers, see MASTER AND SERVANT.
- Malpractice by dentist, see PHYSICIANS AND SURGEONS.
- Negligent operation of railroads, see RAILROADS.
- Injuries caused by operation of street cars, see STREET RAILROADS.
- By warehousemen, see WAREHOUSEMEN.

Towns:

- Mandamus to compel filing of information in *quo warranto* to test validity of incorporation of, see MANDAMUS, 1.
- Exclusion of agricultural lands from corporate limits as denial of uniformity of taxation, see TAXATION, 3.

Transcripts:

- Of record for purpose of review, see APPEAL AND ERROR, 7-12.

Transfer:

- Of corporate shares, see CORPORATIONS, 2, 3.

Trial:

- Review of rulings as dependent on presentation of objection or exception in lower court, see APPEAL AND ERROR, 3, 4.
 - Review of rulings as dependent on presentation of same by record, see APPEAL AND ERROR, 7-12.
 - Review of findings in trial by court, see APPEAL AND ERROR, 20, 21.
 - Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 22-31.
 - Instructions in action for injury to passenger, see CARRIERS.
 - In criminal prosecutions, see CRIMINAL LAW; HOMICIDE.
 - Affidavits of jurors on motion for new trial to impeach verdict in criminal prosecutions, see CRIMINAL LAW, 16.
 - Shifting burden of proof, see EVIDENCE, 3.
 - Instructions in action for malpractice by dentist, see PHYSICIANS AND SURGEONS, 2.
 - Objections to pleadings at trial, see PLEADING.
 - Examination of witnesses, see WITNESSES.
1. TRIAL (17)—RECEPTION OF EVIDENCE—MATTERS NOT CONTROVERTED.
It is not error to exclude evidence upon an issue which was admitted in open court and not denied by answer. *Thomas v. Thomas*.... 127

Trial—Continued.

2. TRIAL (24)—RECEPTION OF EVIDENCE—CUMULATIVE EVIDENCE. It is not error to exclude a certified copy of a judgment of dismissal which would only have been cumulative evidence of an admitted fact. *Borg v. Bringham*..... 521
3. TRIAL (29)—RECEPTION OF EVIDENCE—REBUTTAL. Where the plaintiff's evidence in chief showed good workmanship in the manufacture of tanks for the defendant, and defendant's evidence showed they were leaky, it is proper rebuttal for the plaintiffs to show an admission by the defendant's plumber that he had caused the leakage. *Haskell v. Carlisle Packing Co.*..... 368
4. TRIAL (33)—RECEPTION OF EVIDENCE—REOPENING CASE. It is not error to refuse to reopen a case for further testimony after granting a nonsuit, where the proposed testimony would not have changed the result. *Vlastelica v. Baretich*..... 638
5. TRIAL (56)—TAKING CASE FROM JURY—NONSUIT. Where there are no disputed facts for the jury, it is a matter of law for the court, on motion for nonsuit. *Olsen v. Veness*..... 599
6. TRIAL (83, 100)—INSTRUCTIONS—REQUEST. The designation of instructions as requested by either party, while not commendable, is not error, although commented on by counsel, where the jury was instructed to consider the instructions as a whole, and were not unduly influenced. *Thomas v. Thomas*..... 127

Trover and Conversion:

Garnishment in action on implied contract to repay money wrongfully converted, see GARNISHMENT, 2.

Liability of bailee for conversion, see WAREHOUSEMEN.

Trusts:

1. TRUSTS (10)—EXPRESS TRUSTS—PAROL PROOF. Where an heir conveyed an interest in an estate to the deceased's widow in consideration of the latter's agreement to will all the estate to him upon her death, the trust, if any, was an express trust, which cannot be established by parol where it affects real property. *In re Parkes' Estate* 586
2. TRUSTS (20)—CONSTRUCTIVE TRUST—FRAUD. Property obtained through the fraudulent practices of a third person will be held under a constructive trust for the person defrauded although the person receiving the benefit was innocent of collusion, since he adopted the means by which it was procured. *Saar v. Weeks*..... 628

Ultra Vires:

Issuance of certificates of preferred rights, see CORPORATIONS, 1.

Uniformity:

Of taxes, see TAXATION, 3.

Unlawful Detainer:

- See LANDLORD AND TENANT, 4.
- Against lessee of mining claims, see MINES AND MINERALS.

Vacation:

- Of attachment, see ATTACHMENT.
- Sale of decedent's property, see EXECUTORS AND ADMINISTRATORS, 6.
- Of appointment of receiver, see RECEIVERS.
- Of tax assessed against state land, see TAXATION, 6.

Value:

- Limits of jurisdiction, see APPEAL AND ERROR, 1.
- Determination of value of property for purpose of taxation, see TAXATION, 7-9.

Variance:

- In action for breach of building contract, see CONTRACTS, 4.
- In charging offense of failure to pay tonnage tax on frozen fish, see FISH, 2.
- In prosecution for larceny, see LARCENY, 2.

Vehicles:

- Negligence of driver of auto stage imputed to passenger, see NEGLIGENCE, 2.

Vendor and Purchaser:

- Parol evidence in action for fraud inducing trade for land, see EVIDENCE, 10.
- False representations in sale of land, see FRAUD, 1, 2.
- Sale of mining property, see MINES AND MINERALS.
- Right of purchasers on partition sales, see PARTITION.
- Sale of oyster lands by state, see PUBLIC LANDS.
- Transfers of ownership of personal property, see SALES.
- Conveyances by cotenant, see TENANCY IN COMMON.

1. VENDOR AND PURCHASER (60, 61, 73)—RESCISSION BY VENDOR—FRAUD. Defendants may rescind the entire sale as a single transaction, where they were induced to sell by means of artifice and misrepresentation, and then, while dealings were in progress for the purpose of correcting misdescriptions, cancelled a mortgage and accepted another on worthless security; and it is immaterial that they were guilty of stupidity and dealt at arm's length, where they were imposed upon and lulled into a state of undue carelessness by artifice and the transaction was violative of good conscience. *Thomas v. Moore*..... 293
2. SAME (124)—NOTICE—RECORDS IN CHAIN OF TITLE. A deed conveying part of a lot and granting an easement in the remainder, is within the chain of title to the remainder, so as to import notice to subsequent purchasers of the remainder, even though executed by only one of two tenants in common. *Jones v. Berg*..... 69

Vendor and Purchaser—Continued.

3. **VENDOR AND PURCHASER (125)—BONA FIDE PURCHASER—NOTICE—RECORDS—INDEX.** An index of the record of a deed giving the description as parts of lots 5 and 6, is a sufficient compliance with Rem. Code, § 8787, to put a purchaser upon inquiry as to a building restriction in the deed against adjoining property in lot six, granting an easement in eight feet along the common boundary. *Jones v. Berg* 69
4. **VENDOR AND PURCHASER (126)—BONA FIDE PURCHASER—NOTICE BY RECORD.** Where one of two cotenants conveyed part of the common property with building restrictions and subsequently both cotenants conveyed the remainder by quitclaim, their acts and acquiescence amounting to a partition, one claiming by warranty deed through the quitclaim grantee, with notice by record of the previous conveyance, takes with notice of, and is bound by, the building restrictions. *Jones v. Berg*..... 69
5. **SAME (126).** In such case, the fact that the quitclaim of the remainder may have been in satisfaction of the mortgage upon the remainder, prior in time to the conveyance, does not give the quitclaim grantee the right to question the validity of the building restrictions; since the mortgage title was not perfected. *Jones v. Berg* 69

Venue:

Criminal prosecution, see **CRIMINAL LAW**, 2.

Review of discretion in denying motion for change of, see **CRIMINAL LAW**, 20.

Verdict:

Review on appeal or writ of error, see **APPEAL AND ERROR**, 18, 19.

Impeachment of by testimony or affidavit of jurors, see **CRIMINAL LAW**, 16.

Inadequate or excessive damages, see **DAMAGES**, 2, 3.

Wages:

Of servant, see **MASTER AND SERVANT**, 1.

Waiver:

See **ESTOPPEL**.

Of error, see **APPEAL AND ERROR**, 13.

Notice to contractor of furnishing materials to subcontractor, see **COUNTIES**.

Of tort in action to set aside preference under bankruptcy act, see **GARNISHMENT**, 2.

Defects in parties, see **PARTIES**, 3.

Privilege of accused, see **WITNESSES**, 3.

Warehousemen:

1. **WAREHOUSEMEN (7) — ACTION FOR CONVERSION—TITLE—EVIDENCE.**
An action for the conversion of wheat held in warehouse, must fail where plaintiff had sold all his receipts, representing all his wheat, although, due to a commingling of other wheat, a portion of it remained in the warehouse after full delivery to the purchaser; since plaintiff had no title. *Hancock v. Pacific Coast Elevator Company* 149

Warranty:

On sale of goods, see **SALES**, 4.

Waters and Water Courses:

1. **WATERS AND WATER COURSES (61, 62)—PRESCRIPTIVE RIGHTS—EXTENT—LACHES—ESTOPPEL.** Where an owner, entitled by prescription to seepage waters for irrigation, for years delayed to establish her rights, refused to accept the waters through a closed drain and stood by for years while adjoining lands were drained and reclaimed at great expense, she is estopped by laches from interfering with the reclamation; and her prescriptive right should be subject to such diversion as may be necessary to protect the lands drained, which can in no event be used as a reservoir for the storage of the waters. *Mason v. Yearwood*..... 335

Ways:

Private rights of way, see **EASEMENTS**, 1, 3.

Wills:

Specific performance of contracts to devise, see **SPECIFIC PERFORMANCE**, 3.

1. **WILLS (7) — TESTAMENTARY CAPACITY — EVIDENCE — SUFFICIENCY.**
Want of testamentary capacity to execute a will is not shown, as against the positive testimony of the subscribing witnesses, by the evidence of one witness tending to show incompetency prior to the day on which the will was executed, such witness testifying that he was rational on that day. *Terpening v. Beach*..... 270
2. **WILLS—CONSTRUCTION—PAYMENT OF DEBTS.** A testator charges the payment of all debts, separate and community, upon his half of the community property, notwithstanding Rem. Code, § 1342, making each share liable therefor, and the wife takes her half freed therefrom as against other legatees, where, by the first paragraph, he directed his executors, as soon as they have sufficient funds, "belonging to my estate," to pay the funeral and administration expenses and all debts properly chargeable against his estate, and by the next paragraph willed to his wife her half of the community property, which, by Rem. Code, § 5917, he had no authority to will. *Redelsheimer v. Zepin*..... 199

Witnesses:

- Testimony of accomplices, see **CRIMINAL LAW**, 4.
 Competency of witness convicted of perjury to testify in own behalf, see **CRIMINAL LAW**, 5.
 Absence of witness as ground for continuance, see **CRIMINAL LAW**, 6.
 Exclusion of evidence offered to impeach prospective witness for state, see **CRIMINAL LAW**, 8.
 Credibility of as question for jury, see **CRIMINAL LAW**, 9.
 Opinions, see **EVIDENCE**, 13, 14.
 Perjury, see **PERJURY**.
 Credibility of prosecutrix, see **RAPE**.

1. **WITNESSES (55)—COMPETENCY—INFORMATION ACQUIRED BY PHYSICIAN—CRIMINAL ACTIONS.** A physician cannot testify in a criminal case as to information acquired in treating the accused, without his consent, under Rem. Code, § 1214, so providing as to civil actions, and Id., § 2152, providing that the rules of evidence in civil actions shall be, so far as practicable, applied in criminal prosecutions; notwithstanding Id., § 2147, providing that physicians shall be protected from testifying in criminal prosecutions, which merely protects the rights of the physician. *State v. Müller*..... 475
2. **SAME (55)—COMPETENCY—INFORMATION ACQUIRED BY PHYSICIAN.** Where a physician treated accused for a certain disease, it must be assumed that he acquired information of the disease at that time, and that it was necessary to enable him to give treatment, within Rem. Code, § 1214, disqualifying the physician from testifying as to information acquired in attending his patient. *State v. Müller*.. 475
3. **SAME (56)—WAIVER OF PRIVILEGE.** The consent of the accused to testimony by a physician as to the nature of a disease for which he was treated is not shown by the testimony of other witnesses that accused had admitted having been afflicted with such disease; but the waiver must be made by the accused at the trial. *State v. Miller* 475
4. **SAME (63)—EXAMINATION BY COURT.** Error cannot be predicated upon questions propounded by the trial court in efforts to assist a witness who had difficulty in understanding English, where no partiality was shown and no prejudice resulted. *State v. Argentieri* 7
5. **WITNESSES (78) — CROSS-EXAMINATION — SCOPE — LIMITATION TO DIRECT.** In a prosecution for rape of a girl under age, a witness testifying as to a conversation he had with the defendant about the girl, may not be cross-examined relative to conduct between the defendant and girl for the two years prior to the offense. *State v. Argentieri* 7
6. **SAME (107)—EXAMINATION OF CHARACTER WITNESS.** In the examination of a character witness offered by one accused of rape,

Witnesses—Continued.

it is proper for the court to enforce the rule that the witness answer yes or no to the question as to knowledge of reputation, without reference to business reputation, and if the witness answers no, the inquiry is ended; general reputation for good morals, not possible delinquencies, being the proper inquiry. *State v. Argenti* 7

7. **WITNESSES (127)—CORROBORATION—PREVIOUS CONSISTENT STATEMENTS.** In a prosecution for larceny, in which practically the only testimony against the accused was that of two accomplices, which was not "assailed" by the defense by any impeaching evidence otherwise than by the opening statement that it was a "frame up" and by cross-examination, it is error to allow the state, in its case in chief, to corroborate the witnesses by testimony of the sheriff that, in his confession, one of the accomplices had made previous consistent statements. *State v. Braniff*..... 327

Work and Labor:

Contracts of employment, see **MASTER AND SERVANT**, 1.

Enforcement of contract to devise in consideration of services performed by foster child, see **SPECIFIC PERFORMANCE**, 3.

1. **WORK AND LABOR (4, 14)—SERVICES BETWEEN PERSONS IN FAMILY RELATION—EVIDENCE—SUFFICIENCY.** A finding of an express contract of employment of a son and brother-in-law to work on a farm as cook and farm hand is sustained by evidence that he performed the labor under the understanding that defendants intended to pay him satisfactory wages. *Thomas v. Thomas*..... 127
2. **SAME (11)—PLEADING—ISSUES, PROOF AND-VARIANCE.** In an action for wages for services performed on a farm by a son and brother-in-law, evidence of talk of payment by deeding an interest in the farm is unavailing where it was not affirmatively pleaded in the answer. *Thomas v. Thomas*..... 127

Workmen's Compensation Act:

Scope of act, see **MASTER AND SERVANT**, 2.

Writings:

Inspection of, see **DISCOVERY**, 2.

Parol evidence to vary writings, see **EVIDENCE**, 9-12.

Writs:

See **CERTIORARI**; **MANDAMUS**; **PROHIBITION**; **REPLEVIN**.

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4/16/20

